Supreme Court, U.S.
FILED

(1)

No. 97-269 AUG 1 1997

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

INDIVIDUALS FOR RESPONSIBLE GOVERNMENT, INC., a non-profit Nevada Corporation; JANICE BUSE; HILARY BURSON; JUNE LINK, individuals,

Petitioners,

vs.

WASHOE COUNTY, by and through the Board of County Commissioners of the County of Washoe; DIANNE CORNWALL, Chairman; LARRY BECK, Vice Chairman; GENE McDOWELL; STEVE BRADHURST; INDEPENDENT SANITATION CO., INC., A Nevada corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI FROM THE COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARC PICKER, ESQ.
ZEH, POLAHA, SPOO, HEARNE & PICKER
575 Forest St., Suite 200
Reno, Nevada 89509
702/323-5700
Attorney for Petitioner

146 pp

QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS ERRED IN FINDING A LACK OF STANDING OF INDIVIDUALS FOR RESPONSIBLE GOVERNMENT, INC.

2. WHETHER THE CIRCUIT COURT FAILED TO PROPERLY ADDRESS THE MANDATORY TRASH COLLECTION ORDINANCE AND ITS COMPANION FRANCHISE AGREEMENT VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

3. WHETHER THE CIRCUIT COURT ERRED IN FINDING THAT THE TAKINGS CLAUSE WAS NOT VIOLATED BY THE MANDATORY RECYCLING FEE CHARGED.

4. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO FIND THAT THE WASHOE COUNTY ORDINANCE FAILS THE THREE-PART POLICE POWERS TEST.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 26

INDEX TO APPENDICES

Appendix A Order of the United States District Court for the District of Nevada

Appendix B Opinion of the United States Court of Appeals for the Ninth Circuit

Appendix C Plaintiff Individuals for Responsible Government, Inc.'s Cross-Motion for Summary Judgment

Appendix D Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motions for Summary Judgment and Supporting Plaintiffs' Cross-Motion for Summary Judgment

Appendix E Affidavit of Darrel Reed in Support of Opposition to Defendants' Motions for Summary Judgment and Supporting Plaintiffs' Cross-Motion for Summary Judgment

Appendix F Affidavit of Clara Fells in Support of Opposition to Defendants' Motions for Summary Judgment and Supporting Plaintiffs' Cross-Motion for Summary Judgment

Appendix G Affidavit of Janice Buse in Support of Opposition to Defendants' Motions for Summary Judgment and Supporting Plaintiffs' Cross-Motion for Summary Judgment

Appendix H Pertinent Statutes and Ordinances

TABLE OF AUTHORITIES CITED

CASES PAGE

United States

C&A Carbone, Inc., v. Town of Clarkstown, . 15,17,19,20,21,26
511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 349 (1994)

City of Philadelphia v. New Jersey, ... 19
437 U.S. 617, 98 S.Ct. 2531 (1978)

Country Foods, Inc. v. Board of Educ. of Anchorage 20
Sch. Dist., 952 F.2d 1173 (9th Cir. 1992)

Garcia v. Spun Steak, Co. 12
998 F.2d 1480 (9th Cir. 1992)

Guam Society of Obstetricians and Gynecologists v. ADA . . . 13
100 F.3d 691 (9th Cir. 1996)

Hunt v. Washington State Apple Advertising Comm'n, . . . 10,13
432 U.S. 333 (1977)

Individuals for Responsible Government, Inc. v. Washoe 2,9
County, 110 F.3d 699 (9th Cir. 1997)

Lake Mohave Boat Owners Ass'n v. National Park Service, . . 13
78 F.3d 1360 (9th Cir. 1994)

Lujan v. Defenders of Wildlife, ... 10
504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)

Maine v. Taylor, ... 18
477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986)

Medina v. Clinton, ... 14
86 F.3d 155 (9th Cir. 1996)

NLRB v. Jones & Laughlin Steel Corp., ... 17,26
301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937)

Oehrleins, Inc. v. Hennepin County 15
922 F.Supp. 1396 (D.Minn. 1996)

Pacific Northwest Venison Producers v. Baker, ... 18
20 F.3d 1008 (9th Cir. 1994)

Pike v. Bruce Church, ... 19
397 U.S. 137, 90 S.Ct.844, 25 L.Ed.2d 174 (1970)

United Food & Commercial Workers v. Brown Group, ... 10
116 S.Ct. 1529 (1996)

Waste Management of Pennsylvania, Inc. v. Shinn, ... 21
938 F.Supp. 1243 (D.N.J. 1996)

Statutes/Codified Laws

NRS 244.187 3,25

NRS 244.188 3

NRS 444.585 3,23

Washoe County Ordinance 838 3,7

Washoe County Ordinance 848 3,7

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

INDIVIDUALS FOR RESPONSIBLE GOVERNMENT, INC., a non-profit Nevada Corporation; JANICE BUSE; HILARY BURSON; JUNE LINK, individuals,

Petitioners,

vs.

WASHOE COUNTY, by and through the Board of County Commissioners of the County of Washoe; DIANNE CORNWALL, Chairman; LARRY BECK, Vice Chairman; GENE McDOWELL; STEVE BRADHURST; INDEPENDENT SANITATION CO., INC., A Nevada corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI FROM

THE COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioners INDIVIDUALS FOR RESPONSIBLE GOVERNMENT, INC., a non-profit Nevada Corporation; JANICE BUSE; HILARY BURSON; JUNE LINK, individuals, hereby respectfully pray that a writ of certiorari issue to review the judgment and Opinion of the United States Court of Appeals for the Ninth Circuit affirming the decision of the United States District Court for the District of Nevada to grant summary judgment to the Respondents on the issue of constitutionality of county ordinances governing mandatory garbage removal and fees for the same.

OPINIONS BELOW

The unpublished Order of the United States District Court for the District of Nevada appears in Appendix A to this petition. The citation of the opinion of which review is sought in this Court is 110 F.3d 699 (9th Cir. 1997). The Opinion appears in Appendix B to this Petition.

JURISDICTION

The Opinion of the United States Court of Appeals for the Ninth Circuit was filed April 1, 1997. The Order denying the Motion for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was filed May 9, 1997.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Nevada Revised Statutes 244.187, 244.188, and 444.585 and Washoe County Ordinances 838 and 848 are attached as Appendix H to this Petition.

STATEMENT OF FACTS

In April 1992, the Washoe County Commission amended the Washoe County Code by adopting Ordinances 838 and 848 ("Ordinances") to provide for mandatory collection of household garbage from all residents in the unincorporated county. The stated reason of County officials for imposing mandatory collection was to eliminate or reduce illegal dumping in the unincorporated

portions of the County. The resultant main effects of the Ordinances have been: (1) To eliminate freedom of choice for county residents as to with whom they choose to do business, (2) To increase the funds available to the County, (3) To create additional financial burdens on the residents, (4) To create a monopoly for Appellee Independent Sanitation, and (5) To result in the seizure or impairment of their property.

The County purportedly enacted these Ordinances to address the problem of increased dumping in the desert of trash and garbage, but the County already has ordinances which prohibit the dumping of trash, in addition to existing state and federal laws. Citizens of Washoe County, including those who are members of Petitioner INDIVIDUALS FOR RESPONSIBLE GOVERNMENT, have attempted to assist the County in enforcing these anti-dumping ordinances, but have received little cooperation or effort from the County in doing so. Petitioner INDIVIDUALS FOR RESPONSIBLE GOVERNMENT is a nonprofit Nevada corporation formed by persons directly affected by the ordinances

in question for the purpose of addressing said ordinances and bringing this challenge.

In 1992, in response to citizen protests, an Illegal Dumping Task Force was established by the Washoe County Commission with the purpose of educating the public as to the need for proper disposal of trash and garbage and to seek the assistance of the public, law enforcement and health authorities and the judiciary to enforce the anti-dumping ordinances and statutes. This Task Force organized citizen watch programs to assist law enforcement and health officials in apprehending those responsible for the illegal dumping while its members met with law enforcement and judicial officials to ensure that the efforts of private citizens to undertake a significant role in eliminating or reducing illegal dumping would be met with proper enforcement actions. The Task Force was assured by both judicial and enforcement personnel that the full measure of penalties provided by law would be sought in all cases of illegal dumping. The actions and observations of private citizens working in cooperation with the Task Force resulted in several persons

being apprehended, however, none of the individuals apprehended received a fine exceeding one-quarter of the maximum imposed by law.

The County showed limited interest in the enforcement of its anti-dumping ordinances or the state laws on this matter. Illegal dumps continue to proliferate within Washoe County. Few actions have been prosecuted by County for the illegal dumping of trash, and those few cited by the County in newspaper accounts only highlight the continuing existence of the problem which the contested Ordinances were supposed to cure.

Prior to the passage of the Ordinances, the citizens and residents of Washoe County had no mandatory household pickup, and the disposal of garbage was left to free and competitive market forces and the initiative of the residents. Before the passage of the first franchise for the County in 1967, citizens had the choice of at least two services for the collection of their garbage and trash. While a majority of the citizens chose to subscribe to a service (which the County had chosen to limit to a monopoly in 1967),

approximately four thousand citizens declined to contract with Respondent INDEPENDENT SANITATION.

Residents of northern Washoe County took or take their household garbage across state lines into California, for disposal in the community of Susanville. This option was both more convenient and cost effective, as northern Washoe County is considerably closer to Susanville, California, than to the designated Washoe County landfill in Lockwood, Nevada.

Appellants brought their action on July 21, 1994, in the Second Judicial District Court of the State of Nevada in and for Washoe County in the form of a Petition for Declaratory Relief, seeking an order declaring unconstitutional the provisions of Washoe County Ordinances 838 and 848. The matter was removed to the United States District Court for the District of Nevada where it was the subject of various motions and cross-motions for summary judgment. United States Senior District Court Judge Edward C. Reed decided the summary judgment motions in favor of Respondents. Petitioners brought an appeal of the decision to

the Court of Appeals for the Ninth Circuit, which affirmed the District Court's decision after finding that the individual Petitioners and INDIVIDUALS FOR RESPONSIBLE GOVERNMENT, INC., lacked standing to sue under the "dormant commerce clause." The Ninth Circuit then affirmed the District Court's remaining basis for its decision.

Petitioners thereafter filed a Motion for Rehearing and Suggestion of Appropriateness of Rehearing En Banc on April 15, 1997. The motion was denied on May 9, 1997.

REASONS FOR GRANTING THE WRIT

1.

THE COURT OF APPEALS ERRED IN FINDING A LACK OF STANDING OF INDIVIDUALS FOR RESPONSIBLE GOVERNMENT, INC.

In its Opinion in this matter, the Court of Appeals for the Ninth Circuit held that Petitioner INDIVIDUALS FOR RESPONSIBLE GOVERNMENT, INC., did not have standing to bring suit in this matter as the record in the case "does not specify who are the members of Individuals for Responsible Government,

Inc., nor does it specify the organization's purpose." 110 F.3d at 702.

This is simply untrue and this holding overlooks the pleadings and evidence reviewed in the district court's decision, including the Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motions for Summary Judgment and Supporting Plaintiff's Cross-Motion for Summary Judgment, wherein it is noted that IRG's members consist of citizens of Washoe County who have "attempted to assist the county in enforcing these anti-dumping ordinances, but have received little cooperation or effort from the County in doing so." These conclusions are based upon the uncontroverted statements contained within the Affidavit of Petitioner Janice Buse In Support of Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motions for Summary Judgment and Supporting Plaintiff's Cross-Motion for Summary Judgment. Additionally, it must be noted, that neither of the Respondents argued in their Motions for Summary Judgment that Petitioner IRG was an entity

without standing nor that its purposes and membership did not meet the provisions of United Food and Commercial Workers v. Brown Group, 116 S.Ct. 1529, 1534 (1996) or Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977).

In United Food and Commercial Workers v. Brown Group, this Court delineated the basis upon which an association has standing to bring suit on behalf of its members: When its members would otherwise have standing to sue in their own right; when the interests the association seeks to protect are germane to the organization's purpose; and when neither the claim asserted nor relief requested requires participation of individual members in the lawsuit. IRG meets each and every one of these requirements: Its members clearly have standing, as the Ninth Circuit held; the interests IRG seeks to protect are not only germane but almost the sole purpose of the organization; and, the relief sought is that of declaring the statutory scheme unconstitutional not for individual monetary damages. See, 116 S.Ct. at 1534.

In addition, in Lujan v. Defenders of Wildlife, 504 U.S.

555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), this Court addressed the "irreducible constitutional minimum of standing" which requires that three elements be met:

> First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized, (citations omitted); and (b) "actual or imminent, not 'conjectural' or hypothetical,'" (citations omitted). Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." (Citations omitted) Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." (Citations omitted)

504 U.S. at 560, 112 S.Ct. at 2136.

Again, IRG meets each of these criteria: The organization through its individual members has in fact been harmed through the imposition of mandatory garbage fees, legal actions for the collections of such fees, fees for mandatory recycling and taking of either the recyclable items and the members' money through mandatory fees. Second, the causal connection between the injury

and the conduct complained of is obvious, clear and undisputed. Finally, it is not only likely but a certainty that the injury will be redressed and resolved if the mandatory garbage and recyclable ordinances are struck down. Each of these elements has been established through Petitioners' pleadings in the lower court.

In addressing the issue of standing, the Ninth Circuit had previously held that a union local has standing to sue on behalf of its members where its Spanish-speaking members had standing because they could claim injury due to the application of a unfair labor policy, that the employees' interest in the conditions of the workplace was germane to the local's purpose as a collective bargaining agent for the employees and where the claim asserted and relief requested do not require the participation of individual members. Further, the union was only seeking injunctive relief and not damages. See, Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1992). This case is directly analogous to the situation in this matter in that IRG is an association whose members could claim injury (already determined by the Circuit's Opinion), and

chosen members' claims are germane to IRG's purpose, that being the representation of persons interested in the anti-dumping ordinance and the subsequent mandatory trash collection ordinance. Finally, IRG's claims and relief do not require the participation of individual members as the challenge to the ordinance affects all citizens of Washoe County and not just the individual plaintiffs, and the relief sought is to overturn the ordinance — not the collection of damages.

In Lake Mohave Boat Owners Ass'n v. National Park Service, 78 F.3d 1360 (9th Cir. 1994), the Ninth Circuit held that association not to have standing pursuant to the requirements of Hunt v. Washington State Apple Advertising Comm'n, supra, because the relief sought was in the form of damages which would have had to have been determined on an individual basis with each slip owner having to provide their own evidentiary proof.

Similarly, the Ninth Circuit granted standing to a non-profit organization of nurses in Guam Society of Obstetricians and Gynecologists v. ADA, 100 F.3d 691 (9th Cir. 1996), despite the

nurses not being the direct target of the law in question. The appellate court therein recognized the organization's standing based upon the defendant's failure to demonstrate the nurses would not be subject to prosecution for assisting a licensed physician violating the law even though the nurse would not be directly taking the illegal actions. Again, IRG's situation is similar as it sought to challenge this statute which made its members' actions illegal and required them to pay for garbage collection whether it was used or not.

In a most recent decision addressing the question of organizational standing, the Ninth Circuit held that where a district court assumes arguendo that plaintiffs had sufficiently pleaded sufficient injury to satisfy the question of standing, the circuit court will also do so. In Medina v. Clinton, 86 F.3d 155 (9th Cir. 1996), it was held that where the remedy sought would not redress the alleged injury of the plaintiffs, then standing did not exist. In IRG's case, the remedy sought goes to the very heart of the injury alleged.

On the subject of standing under the dormant Commerce Clause provisions, other courts have applied this Court's opinion in C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 389, 114 S.Ct. 1677, 1681-1682, 128 L.Ed.2d 399 (1994), to reach the question of heightened scrutiny in reviewing such matters. In Ben Oehrleins, Inc. v. Hennepin County, 922 F.Supp. 1396 (D.Minn. 1996), the district court noted that the plaintiff therein had standing to raise a Commerce Clause claim after it showed it had been involved in the business of shipping waste and that several plaintiffs had been fined. Analogously, Petitioners have been the subject of enforcement actions to impose the fees in question and were and are effected by the ongoing nature of the ordinance and associated fees.

In order to show standing under the dormant Commerce Clause provisions, a plaintiff must show that he has suffered an injury in fact caused by the challenged activity which can be redressed by the court, and the must show that he falls within the zone of interest sought to be protected by the Commerce Clause.

Petitioner IRG, its members, and the individual Petitioners have met these burdens. They are injured in fact and the activity can be redressed by this Court (see above), and they fall within the zone of interest due to the effect of the mandatory garbage and recycling provisions of the ordinance. Petitioners must pay for such services, even if they never utilize such services. Petitioners are being "taxed" for a service that they had previously provided at a cheaper rate across the state line into California. They are being prevented from utilizing interstate commerce by these mandatory fees.

The Circuit Court failed not only to follow the established case law of this Court, it failed to follow its own prior decisions. Based upon all of the above, the organization and the individual Petitioners should have been found to have sufficiently met the standing requirements.

2.

THE CIRCUIT COURT FAILED TO PROPERLY ADDRESS THE MANDATORY TRASH COLLECTION ORDINANCE AND ITS COMPANION FRANCHISE AGREEMENT

VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

> It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31, 57 S.Ct. 615, 81 L.Ed. 893 (1937).

C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 389, 114 S.Ct. 1677, 1681-1682, 128 L.Ed.2d 399 (1994).

> The collection, transportation and disposal of garbage is beyond doubt an act of commerce. ... [W]hat makes garbage a profitable business is not its own worth, but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.

Carbone, 114 S.Ct. at 1682.

Restrictions on the disposal of trash do reach interstate commerce. The effect of these ordinances is to reserve an area of commerce for a favored local operator. This Court has already spoken as to the scrutiny with which such ordinances should be reviewed. Carbone, supra, at 1683.

> Discrimination against interstate commerce is per se invalid, save in the narrow class of cases in which

> the municipality can demonstrate that, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.

Maine v. Taylor, 477 U.S. 131, 106 S.Ct. 2440. 91 L.Ed.2d 110 (1986).

As held in Pacific Northwest Venison Producers v. Baker, 20 F.3d 1008 (9th Cir. 1994), "the state has the burden of establishing that a legitimate state interest unrelated to economic protectionism is served by the regulations that could not be served as well by less discriminatory alternatives." (Citing Maine v. Taylor, 477 U.S. at 138.)

The IRG/Washoe County matter presents a situation very similar to that presented in Carbone, in which a single favored local operator is granted an exclusive market, in which no other party, local or interstate may compete. Carbone, supra, at 1683. Such an ordinance deprives both in-state and out-of-state businesses of access to the local market, and denies freedom of choice and contract to the citizens resident in Washoe County.

The purported purpose of the contested Ordinances and the

granting of a monopoly franchise could have been achieved through the less intrusive avenue of enforcement of existing regulations, ordinances and statutes. This Court has stated an action is within the scope of the Commerce Clause if it burdens interstate commerce or impedes its flow. This Court has held that two lines of analysis may be applied to determine whether an action violates the Commerce Clause:

> [F]irst, the action discriminates against interstate commerce, City of Philadelphia v. New Jersey, 437 U.S. 617, 625, 98 S.Ct. 2531, 2535 (1978); and second the action imposes a burden that is "clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)

Carbone, supra, at 1682.

In Carbone, this Court held that the township had a variety of nondiscriminatory alternatives for resolving health and environmental problems that should have been exhausted prior to creating a monopoly for the handling of trash. "The most obvious would be uniform safety regulations enacted without the object to discriminate. These regulations would ensure that competitors like

Carbone do not underprice the market by cutting corners." Carbone, supra, at 1683.

In light of the failure of the mandatory garbage collection ordinances and monopoly franchise to achieve the stated goals, there is no adequate justification for the elimination of competition and the interference with personal freedoms.

In its Opinion, the Ninth Circuit failed to address this legal question, holding that the Petitioners lack standing to raise this challenge. The panel failed to properly consider the Petitioners' standing, as seen above, and now the Court must address both the legal questions raised in C&A Carbone, Inc., v. Town of Clarkstown, N.Y., 511 U.S. 383 (1994). Additionally, the position of Petitioners is most closely aligned to that in Big Country Foods, Inc., v. Board of Educ. Of the Anchorage Sch. Dist., 952 F.2d 1173 (9th Cir. 1992), in which the Circuit Court held that where regulatory measures are designed to benefit in-state economic interests by burdening out-of-state competitors, they are prohibited by the dormant commerce clause.

Other courts have applied the Carbone decision, and each have initially questioned the prima facie basis for the plaintiff's case before shifting the burden to the defendant.

> Once a state law is shown to discriminate against interstate commerce either on its face or in practical effect, the burden falls upon the state to demonstrate both that the law serves a legitimate local purpose and that such purpose could not be served by less restrictive means. ... Attempts to fit this narrow exception must be rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem.

Waste Management of Pennsylvania, Inc., v. Shinn, 938 F.Supp. 1243, 1255 (D.N.J. 1996), citing Carbone, 114 S.Ct. at 1683.

3.

THE CIRCUIT COURT ERRED IN FINDING THAT THE TAKINGS CLAUSE WAS NOT VIOLATED BY THE MANDATORY RECYCLING FEE CHARGED

The Ninth Circuit opined that the mandatory recycling fee charged by exclusive franchisee and Respondent Independent Sanitation is the equivalent of a mandatory property tax for the purposes of school support, even upon persons with no children.

This would be a reasonable position if the panel had not overlooked a key fact — the mandatory recycling fee was not approved by the electorate. The fee was put into place by a company which is basically unregulated but which holds a monopoly.

In fact, the appellate panel overlooked a more integral fact — that the monopoly created was also never approved by the electorate nor was the very idea of creating such a monopoly. While some public hearings were held, the stated purpose of the ordinance — to reduce dumping of garbage in the outlying areas of Washoe County — has failed miserably as was explained without argument in Petitioners' pleadings and supporting affidavits. The ordinance is inappropriate for the purpose upon which it is based. The panel overlooked the fact that each of the individual Petitioners and IRG's other, unnamed, members each suffer an ongoing assessment of $1.25 per month as a result of this ordinance.

The franchise agreement entered into by Respondent Washoe County allows Respondent Independent Sanitation to bill all individuals for the collection of recyclables, whether or not any

collection is made. The Nevada State Legislature has put into place a statute which transfers ownership in recyclable materials to a curbside collection agency when such materials are set out for collection at the curbside or at another appropriate site designated for collection. See, Nevada Revised Statute 444.585.1(a) and (b). The obvious and common sense inference is that the ownership of these materials remains with the citizenry until such time as they surrender their interest.

Thus, the recognized property interests of Petitioners and other like situated parties in recyclable materials, as recognized in N.R.S. 444.585, are now subjected to a governmental taking by the imposition of the mandatory assessment in favor of Respondent Independent Sanitation and implicitly approved by Respondent Washoe County. This fee is required to be paid to Respondent Independent Sanitation for mandatory involvement in a curbside recycling program whether recyclable materials are deposited at the curbside or not. The utilization of such a program requires the voluntary surrender of property rights to the Respondent

franchisee, who may profit from the subsequent resale of the recycled goods. However, the citizens of Washoe County are obligated to pay Respondent Independent Sanitation even if those citizens, including Petitioners, choose to retain their own property.

The mandatory collection of recyclable materials and the imposition of a fee for such service serves no purpose other than to limit competition and thereby increase the profits of Respondent Independent Sanitation and to impose a hidden tax through the fees paid by Respondent Independent Sanitation to Respondent Washoe County. By virtue of this imposition, the County is confiscating the property of its citizens, in a manner that is effectively a heavy tax on recyclables within unincorporated Washoe County.

4.

THE CIRCUIT COURT ERRED IN FAILING TO FIND THAT THE WASHOE COUNTY ORDINANCE FAILS THE THREE-PART POLICE POWERS TEST

While the district court was correct in its standard, both it and the Circuit Court overlooked facts which show that the ordinances in question fail the three-part police powers test each

court quoted.

While the ordinance are aimed at serving some legitimate purpose and are rationally related to that purpose, the county government overstepped its authority as granted by the state. The state law in question, Nevada Revised Statutes 244.187 requires a balancing test to show that the collection and disposal of garbage or other waste be performed in a manner that is "adequate, economical and efficient" and that it "promote[s] the general welfare." As Petitioners showed in their evidence, these criteria were not met.

The ordinances permit the creation of a nearly unregulated monopoly which imposes mandatory fees upon persons who do not use the service, as well as upon those who do. Additionally, there is allowed a non-voter approved "tax" which requires payment for removal of property — recyclable items — without providing for any compensation to the citizen from whom the property is taken. While the citizens do not have to use the services of the recyclable pickup, they must still pay — and then their money is the only thing being "taken."

> It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31, 57 S.Ct. 615, 81 L.Ed. 893 (1937).

C&A Carbone, Inc. v. Town of Clarkstown, --- U.S. --, 114 S.Ct. 1677, 1681-1682, 128 L.Ed.2d 399 (1994).

> The collection, transportation and disposal of garbage is beyond doubt an act of commerce. ... [W]hat makes garbage a profitable business is not its own worth, but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.

Carbone, supra, at 1682.

CONCLUSION

Based upon all of the foregoing, the United States Supreme Court should issues a Writ of Certiorari in order to review this matter and the decisions and orders issued by the United States District Court for the District of Nevada and the Circuit Court of Appeals for the Ninth Circuit.

...

...

Respectfully submitted this 29th day of July, 1997.

Respectfully Submitted,

ZEH, POLAHA, SPOO, HEARNE & PICKER

By: _____

MARC PICKER, ESQ.
Attorney for Petitioner

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

INDIVIDUALS FOR RESPONSIBLE GOVERNMENT, INC., a non-profit Nevada Corporation; JANICE BUSE; HILARY BURSON; JUNE LINK, individuals,

Petitioners,

vs.

WASHOE COUNTY, by and through the Board of County Commissioners of the County of Washoe; DIANNE CORNWALL, Chairman; LARRY BECK, Vice Chairman; GENE McDOWELL; STEVE BRADHURST; INDEPENDENT SANITATION CO., INC., A Nevada corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI FROM THE COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO PETITION

MARC PICKER, ESQ.
ZEH, POLAHA, SPOO, HEARNE & PICKER
575 Forest St., Suite 200
Reno, Nevada 89509
702/323-5700
Attorney for Petitioner

APPENDIX A

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
OCT 16 1995
CLERK, U.S. DISTRICT COURT
BY /s/ DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

INDIVIDUALS FOR RESPONSIBLE GOVERNMENT, INC., et al.,

Plaintiffs, CV-N-94-526-ECR

vs.

WASHOE COUNTY, et al., ORDER

Defendants.

/

The court now rules on Defendants' Motions for Summary Judgment (Docs. ##16, 17) and on Plaintiffs' Cross-Motion for Summary Judgment (Doc. #18).

This is an action for declaratory judgment. Plaintiffs allege that certain Washoe County ordinances relating to the collection of

garbage are unconstitutional, and seek such a declaration from this court. The claim is that the ordinances violate the Commerce and Due Process Clauses of the Constitution of the United States.

Plaintiffs claim that the ordinances exceed Defendant Washoe County's police power. Plaintiffs express dissatisfaction with Washoe County's failure to make findings that its exclusive contract with ISC was more beneficial than some other means of collecting the county's trash. Plaintiff decries the lack of "evidence" that the franchise serves its purpose. Plaintiff further complains that the local ordinance was not "narrowly tailored." This court is not the appropriate body to which to address plaintiffs' complaint regarding the wisdom of the county's decision. If the ordinance was (1) within the scope of the authority granted the county by the state government, (2) aimed at serving some legitimate public purpose and (3) rationally related to that purpose, this court will not second-guess the county government. See L&H Sanitation, Inc., v. Lake City Sanitation, Inc., 769 F.2d 517, 522 (9th Cir. 1985).

The State of Nevada has explicitly granted local governments

the authority to grant exclusive garbage collection franchises. Nev. Rev. Stat. §§244.187, 244.188. Plaintiffs' police power agrument is therefore without merit.

Plaintiffs rely on the United States Supreme Court's recent decision in C&A Carbone, Inc. v. Town of Clarkstown, 114 S.Ct. 1677 (1994), to bolster their Commerce Clause objection to Washoe County's decision to grant Defendant Independent Sanitation Co., Inc. (ISC) an exclusive waste collection franchise. Their reliance is ill-founded: Carbone struck down a local ordinance whose primary purpose was the generation of revenue for the benefit of the local waste-processor. As such, the ordinance in Carbone was analyzed under the more rigorous of the two prevailing Commerce Clause tests.

The Ninth Circuit recently distinguished the two approaches: "If the primary purpose of the regulation is to regulate interstate commerce and thus to invade the province of Congress, or if the regulation favors in-state interests over out-of-state interests, then it will generally be subject to rigorous constitutional scrutiny. If,

however, the regulation in question is designed to address a legitimate local concern and incidentally affects interstate commerce, we must use the Pike balancing test ...." Kleenwell Biohazard Waste and Gen. Ecology Consultants, Inc., v. Nelson, 48 F.3d 391, 398 (9th Cir. 1995).

The Commerce Clause "balancing test" derives from the decision of the Supreme Court in Pike v. Bruce Church, 397 U.S. 137 (1970). Pike recognized that "incidental burdens on interstate commerce may be unavoidable when a State regulates to safeguard the health and safety of its people." City of Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978). A challenged regulation which even-handedly serves a legitimate local public interest, and affects interstate commerce only incidentally is now unconstitutional "unless the burden imposed upon [interstate] commerce is clearly excessive in relation to the putative local benefit." Pike, 397 U.S. at 142.

Few local public interests can claim greater legitimacy than the interest in managing the garbage output of a community. It is this very interest which the state statute and local ordinance at issue here

are designed to serve. It is simply beyond question that (1) the state in plain language authorized Washoe County to enter into exclusive franchise agreements for the disposal of garbage, (2) efficient garbage disposal is a legitimate public interest, and (3) the county's grant of an exclusive franchise to ISC is rationally related to that interest. Since it cannot be said that Washoe County's scheme imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits, see Pike, 397 U.S. at 142, the conclusion that the statute and ordinance do not violate the Commerce Clause is therefore inescapable.

Carbone struck down a scheme whereby all local waste haulers were forced to do business with the local processing facility. Plaintiffs seize upon the superficial similarity between the waste processor in Carbone and ISC in the present case. All Washoe County residence and business must, under the challenged ordinance, subscribe to ISC's service. There, however, the parallel ends. In Carbone, the cost of the service was inflated in order for the government to recoup its investment in the facility. In the present

situation, there is no evidence that the county's purpose is anything other than efficient sanitation. Moreover, there is not even the hint of discrimination against out-of-state businesses. The county makes not distinction between local and non-local businesses. Plaintiffs themselves acknowledge as much when they assert that the "ordinance deprives both in-state and out-of-state businesses of access to the local market." Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motions for Summary Judgment and Supporting Plaintiffs' Cross-Motion for Summary Judgment, Doc. #19, Page 5. All persons and businesses who generate trash in Washoe County must dispose of it through ISC.

It strains credulity to read Carbone so as to deprive local governments the authority to delegate the collection of trash to a private entity, at least where the local government's interest relates solely to health and safety, and not to the preservation of revenue sources. Were it otherwise, vast numbers of municipalities and county governments would find themselves unable to provide for the collection of trash. This court is loath to attribute such an intention

on the part of the Carbone Court.

Plaintiffs' due process and takings claims are similarly meritless. The Due Process and Just Compensation Clauses do not limit the power of local governments to provide for the collection and disposal of trash. California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905); Michigan v. Gardner, 199 U.S. 325 (1905) (both cited in USA Recycling Inc. v. Babylon, New York, 64 U.S.L.W. 2186 (2d Cir. 1995)). Both those early cases upheld the validity of local ordinances granting exclusive franchises to private trash collection entities. As the Second Circuit observed in USA Recycling, if all exclusive trash collection franchises were held unconstitutional, thousands of municipalities would henceforth be unable to undertake the traditional government function of collecting garbage. USA Recycling, 64 U.S.L.W. at 2187.

Plaintiffs' claim that the imposition of county-wide recycling fees subjects them to an uncompensated taking is almost too frivolous to deserve comment. Plaintiff argues that by forcing even those citizens who refuse to recycle their glass, aluminum or paper waste to

contribute to the recycling program, the county deprives them of property without compensation, in violation of the Fifth Amendment to the U.S. Constitution. The argument is utterly without merit. Under this reasoning, a citizen who refrains from telephoning the local fire department when her lawn catches fire, and chooses instead to fight the blaze herself, should be exempt from that portion of her local tax assessment used to maintain the fire department. Plaintiff's conclusory allegation that the imposition of the recycling program and the collection of fees for its maintenance "serve[] no purpose other than to limit competition and thereby increase [ISC's profits]" is not worthy of refutation. Recycling programs are unquestionably a legitimate function of local governments, despite Plaintiff's objections.

IT IS THEREFORE ORDERED that Defendants' Motions for Summary Judgment (Docs. ##16, 17) are hereby **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' Cross-Motion for Summary Judgment (Doc. #18) is hereby **DENIED**.

IT IS FURTHER ORDERED that the Clerk shall enter

judgment accordingly.

DATED: October 11, 1995.

Edward C. Reed
UNITED STATES DISTRICT JUDGE

APPENDIX B

INDIVIDUALS FOR RESPONSIBLE GOVERNMENT INC., a non-profit Nevada corporation; JANICE BUSE; HILARY BURSON; JUNE LINK, individuals, Plaintiffs-Appellants,

v.

WASHOE COUNTY, By and through the Board of County Commissioners of the County of Washoe; DIANNE CORNWALL, Chairman; LARRY BECK, Vice Chairman; GENE McDOWELL; STEVE BRADHURST; INDEPENDENT SANITATION CO., INC., a Nevada corporation, Defendants-Appellees.

No. 95-17264

United States Court of Appeals,
Ninth Circuit
Submitted* Feb. 14, 1997
Decided April 1, 1997

* The panel finds this case appropriate for submission without argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

Appeal from the United States District Court for the District of Nevada. D.C. No. CV-94-00526-ECR. Edward C. Reed, Jr., District Judge, Presiding.

Marc Picker, Reno, Nevada, for the plaintiffs-appellants.

Melanie Foster, Deputy District Attorney, Reno, Nevada; Frank Cassas, Marshall Hill Cassas & de Lipkau, Reno, Nevada, for the defendants-appellees.

Before: Joseph T. Sneed, Edward Leavy, and Sidney R. Thomas,

Circuit Judges.

SNEED, Circuit Judge:

As happens from time-to-time, this is a case with simple facts whose resolution involves complex legal doctrines. In 1991 and 1992, defendant/appellee Washoe County enacted ordinances that, inter alia, require residents in certain unincorporated areas of the County to subscribe to a garbage collection and disposal service offered by defendant/appellee Independent Sanitation Co., Inc. Plaintiffs/Appellants Individuals for Responsible Government Inc., Janice Buse, Hilary Burson and June Link claim that these ordinances violate Nevada statutes and the Commerce Clause of the United States Constitution. They also claim that the County's curbside recycling program violates the Takings Clause of the United States Constitution. The district court granted summary judgment in favor of defendants/appellees on all counts. We affirm.

I.

BACKGROUND

Washoe County, Nevada, like many other environmentally

concerned communities, confronts a problem stemming from the illegal dumping of trash at sites other than approved dump sites. In response to this problem, the Board of County Commissioners ("Commissioners"), in November 1991, enacted ordinance 838 to amend chapter 90 of the County Code. Ordinance 838 provides that the County and its authorized agents or contractees "have the exclusive right to gather, collect and haul garbage" in certain unincorporated areas in Washoe County. It also provides that "every owner of real property who accumulates or causes the accumulation of garbage . . . must subscribe to the [services for] collection, hauling and disposal of garbage" provided by the county through Independent Sanitation Co., its exclusive franchisee. n1

- - - - - - - - - - - - - - - - - Footnotes- - - - - - - - - - - - - - - - - - -

n1 By means of a contract dated April 14, 1992, the County granted Independent Sanitation an exclusive franchise to "operate all garbage collection and disposal services in the unincorporated areas" of Washoe County. The April 1992 contract amended an earlier, similar contract that had been in force since 1983.

----------End Footnotes----------

In April 1992 the Commissioners enacted ordinance 848, which further amends chapter 90 of the County Code. Ordinance 848 creates an exemption from mandatory subscription to Independent Sanitation's garbage service for those owners and occupants of residential dwelling units who prefer to dispose of their own garbage. To qualify for such an exemption, these residents must haul their garbage "to an approved disposal site not less than every 7 calendar days." Independent Sanitation maintains the right to bill, on a quarterly basis, those who have been exempted. However, an exempt resident need not pay the bill provided that he submits to Independent Sanitation "receipts or other proof showing that he has disposed of his garbage at an approve [sic] disposal site for each week within the previous quarter."

The enforcement of ordinances 838 and 848 encountered difficulties. Prior to their passage, approximately 12,000 of Washoe County's 16,000 rural households subscribed to Independent Sanitation's garbage service, while approximately 4000 rural residents

elected to dump their own trash. There are two legal dump sites in Washoe County, Nevada: the "Lockwood" landfill, located east of Reno, and the "Reno transfer station," located in the city of Reno. Independent Sanitation and its affiliate Reno Disposal Co. maintain and operate both dump sites. Despite these legal dumping options within Washoe County, prior to enactment of ordinances 838 and 848 many county residents preferred to dispose of their household garbage in California because the dump sites in Susanville and Portola, California were more convenient and cost effective than the options available in Washoe County.

In response to ordinance 848, approximately 400 residents received exemptions from mandatory collection, allowing them to dispose of their own garbage. However, some who initially obtained exemptions later had their exemptions revoked for failure to provide receipts documenting their weekly disposal of garbage. As of August, 1993, Reno Disposal Co. had filed suit in small claims court against 72 Washoe County residents who had failed to pay for their garbage service. Those subjected to suit included at least one person who

refused to pay after his exemption was revoked.

Appellant June Link, among others, was angry about being brought into court and ordered to pay for a service that she neither wanted nor believed she needed. Appellants Hilary Burson and Janice Buse also object to being forced to pay for a service they do not want. Hence, in July 1994, appellants filed suit in state court, seeking a declaratory judgment that ordinances 838 and 848 are unconstitutional. Appellees removed the case to federal district court and filed motions for summary judgment. The district court granted appellees' motions for summary judgment in October, 1995. Appellants timely appealed.

II.

STANDARD OF REVIEW

The district court had jurisdiction under 28 U.S.C. @ 1331 and @ 1441. This court has appellate jurisdiction pursuant to 28 U.S.C. @ 1291. The district court's grant of summary judgment is reviewed de novo. Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996).

III.

THE DORMANT COMMERCE CLAUSE

Appellants claim that ordinances 838 and 848 violate the so-called "dormant" Commerce Clause, which limits the power of states to regulate interstate commerce. Their argument rests on invoking the possible claims of the operators of the California dump sites who are not parties in this proceeding. Such claims might rest on the Supreme Court's decision in C&A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383 (1994), in which an ordinance that required "all solid waste to be processed at a designated transfer station before leaving the municipality," id. at 386, violated the Commerce Clause because it discriminated against interstate commerce by depriving competitors, including out-of-state firms, of access to a local market. Id. at 389. Their argument appears to be that the ordinance interferes with interstate commerce by preventing them from utilizing dump sites outside the State of Nevada. While we have serious reservations about the strength of this argument, we do not reach the merits of such a claim. Instead, we hold that appellants

lack standing to raise a dormant Commerce Clause challenge.

First, appellant Individuals for Responsible Government, Inc. is a Nevada nonprofit corporation which appears to lack substance. An association, it is true, has standing to bring suit on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." United Food and Commercial Workers v. Brown Group, 116 S. Ct. 1529, 1534 (1996) (quoting Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)). However, the record in this case does not specify who are the members of Individuals for Responsible Government, Inc., nor does it specify the organization's purpose. Absent both purpose and members, it lacks any standing to sue.

The individual plaintiffs, Janice Buse, Hilary Burson, and June Link, lack standing to sue under the "dormant commerce clause." We shall address both the constitutional and prudential requirements for

standing to bring this claim.

A. Constitutional Requirements

"The irreducible constitutional minimum of standing contains three elements." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). These are that the plaintiffs must have suffered an injury in fact; that there be a causal connection between the injury and the conduct complained of; and that it be likely that the injury will be redressed by a favorable decision. Id. at 560-61.

Individual plaintiffs have met these requirements. They allege that Independent Sanitation has "been aggressively utilizing legal processes to force" them to pay for unwanted garbage collection services. In other words, they have been ordered to pay the bill for a service they do not want. That satisfies the "injury-in-fact" requirement. Moreover, there is a direct causal link between enactment of the challenged ordinances and the fact that appellants have been forced to pay for unwanted garbage collection services. Finally, a declaration that the ordinances are unconstitutional would clearly redress their injuries. Therefore, all three individual appellants

meet the minimal constitutional standing requirements.

B. The Prudential Requirements

Apart from the constitutional requirements for standing, there is also a set of prudential principles that bear on the question of standing. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982). One such prudential principle is that the plaintiff's complaint must "fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Id. at 475 (quoting Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 153 (1970)). The so-called "zone of interests" test "denies a right of review if the plaintiff's interests are . . . marginally related to or inconsistent with the purposes implicit in the [relevant constitutional provision]." Wyoming v. Oklahoma, 502 U.S. 437, 469 (Scalia, J., dissenting) (1992) (quoting Clarke v. Securities Industry Assn., 479 U.S. 388, 399 (1987)).

The Supreme Court has applied the zone of interests test most frequently in suits brought under the Administrative Procedure Act.

See, e.g., Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517 (1991); Clarke, 479 U.S. 388. However, the zone of interests test also "governs claims under the Constitution in general, and under the negative [dormant] Commerce Clause in particular." Wyoming, 502 U.S. 437, 469 (Scalia, J., dissenting) (citing Valley Forge, 454 U.S. at 475, and Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 320-21, n.3 (1977)).

To ascertain whether appellants have standing to raise the dormant Commerce Clause challenge in the present case, it must be determined whether their interests bear more than a marginal relationship to the purposes underlying the dormant Commerce Clause. The chief purpose underlying that Clause is to limit "the power of the States to erect barriers against interstate trade." Dennis v. Higgins, 498 U.S. 439, 446 (1991). The appellants' injury, however, is solely that Washoe County's garbage collection ordinance forces them "to pay for unnecessary and unwanted garbage services." That is an injury not even marginally related to the purposes underlying the dormant Commerce Clause.

Appellants primary contention is that ordinances 838 and 848 impose a barrier to interstate commerce by creating regulatory obstacles for residents of Washoe County who, prior to enactment of the ordinances, transported their garbage across state lines for disposal at the dump sites in Susanville and/or Portola, California.

The facts offered in support of this contention are these. Prior to enactment of the ordinances, approximately 4000 residents of Washoe County chose to dump their own garbage, rather than utilizing Independent Sanitation's collection service. After enactment of the ordinances, the county issued about 400 permits exempting residents from the mandatory garbage collection requirement. Thus, as a result of the ordinances, Independent Sanitation gained about 3600 new customers. Since Independent Sanitation operates two dump sites in Washoe County, it is reasonable to infer that the garbage of all 3600 new customers is now being dumped in Nevada. Prior to enactment of ordinances 838 and 848, some unspecified number of those 3600 customers were dumping their garbage in California.

Insofar as they receive garbage from Nevada, the operators of dump sites in California are engaged in interstate commerce. See Carbone, 511 U.S. at 389; Philadelphia v. New Jersey, 437 U.S. 617, 621-23 (1978). Because these ordinances have had the effect of reducing the flow of garbage from Nevada to California, they have imposed a small barrier to interstate commerce.

But even on the implausible assumption that all 3600 new customers previously dumped their garbage in California, we hold that the appellants would still not satisfy the prudential "zone of interests test" set forth in Valley Forge Christian College, supra. Their injury (being forced to pay for services they do not want) would exist even if Independent Sanitation were to dump all the garbage it collects from Nevada across the state line in California. Under those circumstances, the Washoe County ordinance would impose no barrier to interstate commerce. Thus, the appellants' interests are, at best, "marginally related to . . . the purposes implicit in" the dormant Commerce Clause. Clarke, 479 U.S. at 399. Therefore, appellants lack standing to raise a Commerce Clause

challenge because their complaint is not "within the zone of interests to be protected" by that Clause. Camp, 397 U.S. at 153.

IV.

TAKINGS CLAUSE

Although ordinances 838 and 848 are silent with respect to recycling, Independent Sanitation, in its exclusive franchise agreement with Washoe County, has undertaken an obligation to provide a curbside recycling service for all residential customers. Independent Sanitation bills its customers $ 1.25 per month for the recycling service, even if they never use the service. Appellants allege that they have a property interest in recyclable materials, as recognized in Nevada Revised Statutes section 444.585. Appellants further allege that the curbside recycling program constitutes a taking of private property for public use without just compensation, in violation of the Takings Clause.

Appellants' argument is without merit. Independent Sanitation's curbside recycling service cannot be considered a "taking" of recyclable materials, because residents have no obligation

to utilize that service. Residents can legally choose to deliver their recyclable materials to recycling centers, or not to recycle at all. Nor is the $ 1.25 per month service charge a taking. The service charge is essentially equivalent to a general property tax targeted to fund a specific county-wide service. Hence, it is analogous to a school tax that property owners are required to pay, even though their children do not attend public schools. Such property taxes are not "takings," within the meaning of the Takings Clause.

V.

NEVADA STATUTORY CLAIM

Appellants' statutory claims are based on Nevada Revised Statutes 244.187 which provides that "[a] board of county commissioners may, to provide adequate, economical and efficient services to the inhabitants of the county and to promote the general welfare of those inhabitants, displace or limit competition in . . . [the] collection and disposal of garbage and other waste." Appellants contend that Washoe County's mandatory garbage collection plan is not "adequate, economical and efficient," and that it does not

"promote the general welfare." Therefore, appellants contend, Washoe County has exceeded its police powers, and the authority granted to it by NRS 244.187.

In response to this argument, the district court stated:

This court is not the appropriate body to which to address plaintiffs' complaints regarding the wisdom of the county's decision. If the ordinance was (1) within the scope of the authority granted the county by the state government, (2) aimed at serving some legitimate public purpose and (3) rationally related to that purpose, this court will not second-guess the county government.

We agree. The district court correctly decided that Washoe County's mandatory garbage collection plan satisfies this three-part test. Hence, plaintiffs' police power argument is without merit.

VI.

CONCLUSION

We affirm the district court's grant of summary judgment in favor of defendants/appellees.

AFFIRMED.

APPENDIX C

MARC PICKER, ESQ., LTD.
417 West Plumb Lane
Post Office Box 3344
Reno, NV 89504
(702) 324-4533

Attorney for Individuals for
Responsible Government, Inc.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

* * *

INDIVIDUALS FOR RESPONSIBLE GOVERNMENT INC., a non-profit Nevada corporation; JANICE BUSE, HILARY BURSON, and JUNE LINK, individuals, Plaintiffs, vs. WASHOE COUNTY BY AND THROUGH THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WASHOE, CHAIRMAN DIANNE CORNWALL, VICE CHAIRMAN LARRY BECK, GENE MCDOWELL, STEVE	Case No. CV-N-94-526-ECR **PLAINTIFF INDIVIDUALS FOR RESPONSIBLE GOVERNMENT, INC.'S CROSS-MOTION FOR SUMMARY JUDGMENT**

BRADHURST; and
INDEPENDENT SANITATION
CO., INC., a Nevada corporation,

Defendants.

_____/

TO: THE HONORABLE UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA

Plaintiff Individuals for Responsible Government, Inc., moves this court, pursuant to Rule 56, Federal Rules of Civil Procedure, to enter an order in favor of Plaintiff. This motion is made upon the grounds that there is no genuine issue of fact raised by the First Amended Complaint or the answers thereto, and Plaintiff is entitled to judgment as a matter of law.

This motion is based on the instant motion, the memorandum of points and authorities filed herewith, and the records and pleadings on file.

Dated: This 31st day of August 1995.

Law Office of Marc Picker, Esq., Ltd.
417 W. Plumb Lane
P.O. Box 3344
Reno, Nevada 89504

Attorney for Plaintiff Individuals
for Responsible Government, Inc.

By: /S/
Marc Picker, Esq.

APPENDIX D

MARC PICKER, ESQ., LTD.
417 West Plumb Lane
Post Office Box 3344
Reno, NV 89504
(702) 324-4533

Attorney for Individuals for
Responsible Government, Inc.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

* * *

INDIVIDUALS FOR RESPONSIBLE GOVERNMENT INC., a non-profit Nevada corporation; JANICE BUSE, HILARY BURSON, and JUNE LINK, individuals, Plaintiffs, vs. WASHOE COUNTY BY AND THROUGH THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WASHOE, CHAIRMAN DIANNE CORNWALL, VICE CHAIRMAN LARRY BECK, GENE	Case No. CV-N-94-526-ECR **PLAINTIFF'S MEMORANDUM OF POINT AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND SUPPORTING PLAINTIFFS' CROSS-MOTION FOR**

MCDOWELL, STEVE BRADHURST; and INDEPENDENT SANITATION CO., INC., a Nevada corporation,

Defendants.

/

SUMMARY JUDGMENT

I.

Plaintiff Individuals for Responsible Government submit the following memorandum of points and authorities in opposition to Defendants motions for summary judgment and in support of its own cross-motion for summary judgment.

II.

As our country celebrates the triumph of our ideals of free markets and individual choice and responsibility around the world, and as our nation seeks to remove regulatory barriers to the marketplace and increase the competition in services from traditional monopolies such as telephone, cable and, even, electrical power, Washoe County has determined that a command economy with a monopoly is more suited to the needs of Nevadans. Washoe County has eliminated any competition for garbage collection, and imposed

a fee for the collection of property of citizens, such fee to be collected regardless of whether these citizens deign to surrender their property to a franchisee for its own gain.

III.

STATEMENT OF FACTS

In April 1992, the Washoe County Commission amended the Washoe County Code, by adopting Ordinances 838 and 848 ("Ordinances") to provide for mandatory collection of household garbage from all residents in the unincorporated county. The Ordinances have been incorporated into the County Code as Chapter 90. The stated reason of County officials for imposing mandatory collection was to eliminate or reduce illegal dumping in the unincorporated portions of the County. Affidavit of Janice Buse, ¶1 and Exhibit 1. Plaintiff asserts that the primary effects of the Ordinances are: (1) To eliminate freedom of choice for county residents as to with whom they choose to do business, (2) To increase the funds available to the County, (3) To create additional financial burdens on the residents, (4) To create a monopoly for

Defendant Independent Sanitation, and (5) To result in the seizure or impairment of their property. The Ordinances have not addressed the problem of illegal dumping in the unihabited areas, nor are they reasonably and narrowly crafted to achieve the County's stated goal while minimizing the burden on residents of the County.

The County purportedly enacted these Ordinances to address the problem of increased dumping in the desert of trash and garbage. Buse Affidavit at ¶1 and Exhibit 1. The County already has ordinances which prohibit the dumping of trash, in addition to existing state and federal laws. Buse Affidavit at ¶ 4 and Exhibit 2. Citizens of Washoe County, including members of Plaintiff Individuals for Responsible Government, have attempted to assist the County in enforcing these anti-dumping ordinances, but have received little cooperation or effort from the County in doing so. Buse Affidavit at ¶¶ 3-7.

In 1992, in response to citizen protests, an Illegal Dumping Task Force was established by the Washoe County Commission to

educate to the public as to the need for proper disposal of trash and garbage and to seek the assistance of the public, law enforcement and health authorities and the judiciary to enforce the anti-dumping ordinances and statutes. Buse Affidavit at ¶¶ 3-4. This Task Force organized citizen watch programs to assist law enforcement and health officials in apprehending those responsible for the illegal dumping. Task Force members met with law enforcement and judicial officials to ensure that the efforts of private citizens to undertake a significant role in eliminating or reducing illegal dumping would be met with proper enforcement actions. The Task Force was assured by both judicial and enforcement personnel that the full measure of penalties provided by law would be sought in all cases of illegal dumping. Buse Affidavit at ¶¶ 5. The actions and observations of private citizens working in cooperation with the Task Force resulted in several persons being apprehended, however, none of the individuals apprehended received a fine exceeding one-quarter of the maximum imposed by law.

The County has shown limited interest in the enforcement

of its anti-dumping ordinances or the state laws on this matter. Illegal dumps continue to proliferate within Washoe County. Buse Affidavit at ¶8 and Exhibit 4. Few actions have been prosecuted by County for the illegal dumping of trash, and those few cited by the County in newpaper accounts only highlight the continuing existence of the problem which these Ordinances were intended to cure.

Prior to the passage of the Ordinances, the citizens and residents of Washoe County had no mandatory household pickup, and the disposal of garbage was left to market forces and the initiative of the residents. Burson Affidavit at ¶2; Fells Affidavit at ¶¶3-6. In fact, before the passage of the first franchise for the County in 1967, citizens had the choice of at least two services for the collection of their garbage and trash. Fells Affidavit at ¶3. While a majority of the citizens chose to subscribe to a service (which the County had chosen to limit to a monopoly in 1967), approximately four thousand citizens declined to contract with Independent Sanitation. Buse Affidavit, Exhibit 1.

Residents of northern Washoe County took or take their household garbage across state lines into California, for disposal in Susanville. Burson Affidavit at ¶¶4-5. This option was both more convenient and cost effective, as northern Washoe County is considerably closer to Susanville, California than to the landfill in Lockwood, Nevada.

IV.

ARGUMENT

1. The Mandatory Garbage Collection Ordinance Eliminates Competition Without Meeting Standards Required by the Nevada Revised Statutes

Nevada Revised Statutes § 244.187 provides:

> Displacement or limitation of competition: Services: "A board of County Commissioners may, to provide adequate, economical and efficient services to the inhabitants of the county and to promote the general welfare of those inhabitants, displace or limit competition in any of the following areas:
> ...
> 3. Collection and disposal of garbage and other waste.

The County has made no findings and offered no evidence that the imposition of a monopoly franchise is necessarily more

"adequate, economical and efficient" than a free market would provide. The evidence is to the contrary, not only in general economic experience of the country, but specifically in this County. See Fells Affidavit at ¶3.

Moreover, the evidence presented does not support that the "general welfare" of the citizens is improved by the issuance of a monopoly franchise. The regularly stated reason for the issuance of the mandatory franchise is the elimination of illegal dumps. But there is no evidence submitted that the monopoly franchise has accomplished any such thing. See Buse Affidavit at ¶1 and ¶8, and Exhibit 3. The franchise has wholly failed in its stated purpose, while continuing to burden the citizens. The Ordinance was not narrowly tailored to achieve its stated purpose.

2. The Mandatory Trash Collection Ordinance and its Companion Franchise Agreement Violates the Commerce Clause of the United States Constitution

It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow. NLRB v. Jones

& Laughlin Steel Corp., 301 U.S. 1, 31 (1937).

Quoted in C&A Carbone, Inc. v. Town of Clarkstown, -- U.S. ---, 114 S.Ct. 1677, 1681-1682 (1994). The collection, transportation and disposal of garbage is beyond doubt an act of commerce.

> [W]hat makes garbage a profitable business is not its own worth, but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.

Carbone at 1682.

Restrictions on the disposal of trash do reach interstate commerce. The effect of these Ordinances is to reserve an area of commerce for a favored local operator. The United States Supreme Court has already spoken as to the scrutiny with which such ordinances should be reviewed. Carbone at 1683.

> Discrimination against interstate commerce is per se invalid, save in the narrow class of cases in which the municipality can demonstrate that, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.

Maine v. Taylor, 477 U.S. 131 (1986).

This matter presents a situation very similar to that

presented in Carbone, in which a single favored local operator is granted an exclusive market, in which no other party, local or interstate may compete. Carbone at 1683. Such an ordinance deprives both in-state and out-of-state businesses of access to the local market, and denies freedom of choice and contract to the citizens resident in Washoe County.

A. The Purported Purpose of the Mandatory Garbage Collection Ordinance and Monopoly Franchise May Be Achieved Through Enforcement of Existing Ordinances and Statutes

The purported purpose of the Ordinances and the granting of a monopoly franchise may be achieved through the enforcement of existing regulations, ordinances and statutes. The Supreme Court has stated an action is within the scope of the Commerce Clause if it burdens interstate commerce or impedes its flow. The Supreme Court has held that two lines of analysis may be applied to determine whether an action violates the Commerce Clause:

> first, the action discriminates against interstate commerce, Philadelphia, 437 U.S. at 625, 98 S.Ct. at 2535; and second the action imposes a burden that is "clearly excessive in relation to the putative local

benefits" (Pike v. Bruce Church, 397 U.S. 137 (1970).

Carbone at 1682.

In Carbone the Supreme Court held that the township has a variety of nondiscriminatory alternatives for resolving health and environmental problems rather than creating a monopoly on the handling of trash. "The most obvious would be uniform safety regulations enacted without the object to discriminate. These regulations would ensure that competitors like Carbone do not underprice the market by cutting corners." Carbone at 1683.

In light of the failure of the mandatory garbage collection ordinances and monopoly franchise to achieve the stated goals, there is no adequate justification for the elimination of competition and the interference with personal freedoms.

3. Recyclable Materials Are Property of Individuals Pursuant to Nevada Revised Statute Section 444.585.

The franchise agreement entered into by Washoe County allows Independent Sanitation to bill all individuals for the

collection of recyclables, whether or not any collection is made. Buse Affidavit at ¶9, Exhibit 4.

The Nevada State Legislature has determined that ownership of recyclable materials passes to a curbside collection agency only when such materials are set out for collection at the curbside or at another appropriate site designated for collection. N.R.S. §444.585.1(a) and (b). The obvious inference is that the ownership of these materials remains with the citizenry until such time as they surrender their interest.

Petitioners and like situated parties' property interest in their recyclable materials, as recognized in N.R.S. §444.585, is being subject to a governmental taking by the imposition of such fee by Respondents which must be paid to Independent Sanitation for mandatory subscription to a curbside recycling program. The utilization of such a program requires the voluntary surrender of property rights to the franchisee, who may profit from the subsequent resale of the recycled goods. However, the citizens of Washoe County are obliged to pay Independent Sanitation even if

they choose to retain their own property. Buse Affidavit at ¶9, Exhibit 4.

The mandatory collection of recyclable materials and the imposition of a fee for such service serves no purpose other than to limit competition and thereby increase the profits of Independent Sanitation and to impose a hidden tax through the fees paid by Independent Sanitation to Washoe County. By virtue of this imposition, the County is confiscating the property of its citizens, in a manner that is effectively a heavy tax on recyclables within unincorporated Washoe County.

4. Defendants Position Is Based on Cases Which Are Outdated and Have Been Placed in Questionable Status Due to More Recent Supreme Court Decisions.

Defendants have cited numerous cases which state that the granting of a monopoly franchise and mandatory collection of fees is within the power of municipalities. It is not questioned that such was the position of the courts, but we note that very few of the cited cases have been decided in the last few years, and only three

of consequence in the past five years: Peninsula Sanitation v. City of Mustique, 526 N.W.2d 607 (Mich. 1995), Kootenai County Property Assoc. v. Kootenai County, 769 P.2d 553 (Idaho 1989), and Ambulance Service of Reno, Inc. v. Nevada Ambulance Services, Inc., 819 F.2d 910 (9th Cir. 1987).

The Court of Appeals of Michigan, in deciding Peninsula Sanitation, cited no Supreme Court case newer than 1905, thus failing to reflect the Court's tremendous body of case law on the Commerce Clause since that date. As the Court noted in City of Philadelphia v. New Jersey, 98 S.Ct. 2531, '[t]he bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of the Court giving effect to its basic purpose. Id. at 2535 The decision in Ambulance Service of Reno is distinguishable in that the action was based on an alleged violation was of the Sherman Anti-Trust Act, distinct from the grounds asserted in this matter.

Kootenai County Property Assoc. was also decided on different grounds, without a discussion of the issues presented in

this case, being based largely on a challenge to the status of the "fees" as taxes under the Idaho Constitution. Plaintiff also notes that the dissent in that matter cited another Idaho case, Brewster v. City of Pocatello, 768 P.2d 765 (1988) in which the Idaho Supreme Court stated:

> In a general sense a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs.

Id. at 768. In a very real sense, the fees imposed under these Ordinances are taxes.

CONCLUSION

The Ordinances, including the mandatory franchise payments, violate the Commerce Clause in that they fail to allow for any meaningful competition, impair interstate commerce, and are not narrowly tailored to accomplish the stated purposes. The Ordinances also result in an impairment of property rights because of the imposition of a mandatory fee for a purportedly voluntary surrender of valuable private property.

Wherefore, Plaintiff Individuals for Responsible Government, Inc., prays that the Court will deny the Defendants' Motions for Summary Judgment and grant the Plaintiff's Cross-Motion.

Dated: This 31st day of August 1995.

Law Office of Marc Picker, Esq., Ltd.
417 W. Plumb Lane
P.O. Box 3344
Reno, Nevada 89504

Attorney for Plaintiff Individuals
for Responsible Government, Inc.

By: /s/
Marc Picker, Esq.

APPENDIX E

MARC PICKER, ESQ., LTD.
417 West Plumb Lane
Post Office Box 3344
Reno, NV 89504
(702) 324-4533

Attorney for Individuals for
Responsible Government, Inc.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

* * *

INDIVIDUALS FOR RESPONSIBLE GOVERNMENT INC., a non-profit Nevada corporation; JANICE BUSE, HILARY BURSON, and JUNE LINK, individuals,

Plaintiffs,

vs.

WASHOE COUNTY BY AND THROUGH THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WASHOE, CHAIRMAN DIANNE CORNWALL, VICE CHAIRMAN LARRY BECK,

AFFIDAVIT OF DARREL REED IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

MCDOWELL, STEVE
BRADHURST; and
INDEPENDENT SANITATION
CO., INC., a Nevada corporation,

Defendants.
_____/

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

Comes now DARREL REED, being duly sworn, deposes and says:

1. I have resided with my wife, Mary, at 395 Puma Drive, in the unincorporated area of Washoe County for five (5) years.

2. With only two residents at our home and because of our lifestyles, my wife and I produce very little trash or garbage (trash contaminated with organic material).

3. Because of our disposal methods for organic materials, we produce little if any garbage as defined in the Nevada Revised Statutes. We also produce minimal amounts of trash, as defined, and deliver trash and recyclable materials to the appropriate disposal facilities as needed and reasonably prudent to do so.

4. All of our minimal quantity of organic wastes are used in our compost heap, or sent down the disposal and into our cesspool.

5. I obtained an exemption from the Washoe County District Board of Health in December 1992. A true and correct copy of this application is attached as Exhibit 1 to this Affidavit.

6. In June 1994 I received a notice from the Washoe County Board of Health, which indicated that I had not provided sufficient receipts to Independent Sanitation to retain my exemption. A true and correct copy of this notice is attached as Exhibit 2 to this Affidavit. Although I responded to this notice, I was not informed that my exemption had been revoked until an agent of Independent Sanitation handed me a handwritten notation indicating that my exemption had been revoked in October 1994. A true and correct copy of the notation is attached as Exhibit 3 to this Affidavit.

Executed on this ___th day of August, 1995.

/S/
DARREL REED

Subscribed and sworn before me,

a notary public, this 30th day
of August, 1995.

/S/
NOTARY PUBLIC

DISTRICT HEALTH
DEPARTMENT

APPLICATION FOR EXEMPTIONS FROM GARBAGE SERVICE IN THE UNINCORPORATED AREAS OF WASHOE COUNTY

Section 90.037 of the Washoe County Code requires that every owner of real property subscribe to the collection, hauling, and disposal of garbage unless the person qualifies for an exemption.

I, DARREL REED, am entitled to an exemption from garbage service because (check one):

A. ___ There is no garbage produced or stored upon the premises.

B. ___ An easily recognizable condition exists on the property that presents a significant hardship to the resident of the property or to the franchised collector in the normal process of curbside collection of garbage, namely _____

C. _X_ I wish to haul and dispose of my own residential garbage.

In applying for exemption (B or C), I agree to comply with all statutes, laws, codes, and regulations governing the storage, recycling, hauling, and disposal of my garbage.

Listed below are applicable District Board of Health Regulations Governing Solid Waste Management; and I specifically understand that I must:

1. Properly store my garbage and not cause a health hazard; attract or propagate vectors, vermin, or pests; create unpleasant odors; or create a nuisance (045.005);

2. Not store garbage on my property for more than seven (7) days (040.030);

3. Haul my garbage to an approved disposal site not less than once every seven (7) days (050.080), (050.145);

EXHIBIT 1

4. Prevent littering and nuisances at the loading point, during transport, and at the disposal site (050.015);

5. Tightly cover the waste and the vehicle during transport to the disposal site (050.045); and

6. Haul only my own garbage and not provide garbage service to any other person (050.010), (050.025).

I agree and understand that I must maintain receipts or provide other proof that my garbage was disposed of at an approved disposal site. I agree and understand that if I fail to comply with any of the above-listed conditions, this exemption may be revoked and I will be required to subscribe to regular garbage service. I further agree and understand that this exemption is not transferable from person to person or from parcel to parcel.

Address: 395 Puma Drive, Carson, Nevada 89704
Assessor's Parcel No.: 050-403-16
Telephone # 883-0404
Date: 11-23-92 Signature: /s/

FOR STAFF USE ONLY

Reviewed and approved by: /s/
Exemption # 0186C
Notes: _____ Date: 12/8/92

RENO WASHOE COUNTY SPARKS
NEVADA

DISTRICT HEALTH DEPARTMENT

June 9, 1994

Re: 0186C

Dear Darrel and Mary Reed:

Sometime ago, at your request, an exemption from garbage service in the unincorporated areas of Washoe County was approved by this department and a pink copy should still be in your possession. This exemption process is provided for in Section 90.037 of the Washoe County Ordinance No. 838, Bill No. 1013, effective December 2, 1991, and the amended Ordinance No. 848. Bill No. 1023, effective April 28, 1992.

When you placed your signature on the exemption you agreed to the six (6) conditions listed, number three being that you would haul your garbage to an approved disposal site not less than once every seven (7) days (050.015 and 050.145). In order for the exemption to remain in force, it was necessary for you to receive disposal receipts each week from the landfill and submit them to the franchised disposal company along with your quarterly statement to have your account credited for that quarter.

On the exemption form, above your signature, it states in part "I agree and understand that if I fail to comply with any of the above listed conditions, this exemption may be revoked and I will be required to subscribe to regular garbage service". Records from the disposal company indicate that you have not complied with the exemption conditions.

EXHIBIT 2

BEST AVAILA

Within fifteen (15) days from the receipt of this letter, you must submit a written response explaining why your exemption should not be revoked. Please mail to Washoe County District Health Department, Attention: Bob Sack, Environmental Health Services, P.O. Box 11130, Reno, NV 89520. If you fail to reply within the fifteen day period, this letter will serve as your NOTICE OF REVOCATION of your exemption and you will be required to take service from the franchised disposal company in your area.

Sincerely,
/s/
Carl R. Cahill, Director
Environmental Health Services

CRC:jd
cc: Tom Green, Reno Disposal Company

1001 EAST NINTH STREET/P.O. BOX 11130, RENO, NEVADA 89520 (702)328-2400 FAX (702) 328-2279

BLE COPY

APPENDIX F

MARC PICKER, ESQ., LTD.
417 West Plumb Lane
Post Office Box 3344
Reno, NV 89504
(702) 324-4533

Attorney for Individuals for
Responsible Government, Inc.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

* * *

INDIVIDUALS FOR RESPONSIBLE GOVERNMENT INC., a non-profit Nevada corporation; JANICE BUSE, HILARY BURSON, and JUNE LINK, individuals,	Case No. CV-N-94-526-ECR
Plaintiffs,	
vs.	AFFIDAVIT OF CLARA FELLS IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND
WASHOE COUNTY BY AND THROUGH THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF	

WASHOE, CHAIRMAN DIANNE CORNWALL, VICE CHAIRMAN LARRY BECK, MCDOWELL, STEVE BRADHURST; and INDEPENDENT SANITATION CO., INC., a Nevada corporation,

Defendants.

_____/

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

Comes now CLARA FELLS, being duly sworn, deposes and says:

1. I have resided at 1475 East 10th Street, Reno, in Washoe County and have lived in Washoe County since 1955.

2. My late husband and I operated "Speedy Pick-Up Service," a competing business with Independent Sanitation from 1959 through the present time.

3. Prior to the enactment of monopoly franchise ordinances by the Washoe County Council Speedy Pick-Up was providing trash and garbage collection services in the unincorporated portions Washoe

County, including Lemmon Valley, Sun Valley and south into Douglas County.

4. At no time was Speedy Pick-Up Service given an opportunity to bid on the franchise for collection of trash and garbage from the unincorporated areas of Washoe County.

5. Speedy Pick-Up Service purchased garbage trucks to meet the requirements of Reno City Ordinance 5.28.040 while serving Lemmon Valley and Sun Valley. However, the Washoe County Franchise was enacted shortly thereafter, forcing Speedy to pay for the vehicles while being denied the opportunity to serve and compete.

6. Speedy Pick-Up Service has been effectively eliminated from competing with Independent Sanitation by the granting of non-bid franchises with Washoe County, Reno, and Sparks.

7. Independent Sanitation has previously brought suit against Speedy Pick-Up Service and my late husband Ellis Fells for continuing to pick-up trash. See Complaint, file stamped February 5, 1971, attached as Exhibit 1 to this Affidavit. A subsequent opinion by the then District Attorney, now Supreme Court Justice Robert

Rose, determined that the County and Independent Sanitation had exceeded their authority by including trash within the franchise. Letter of District Attorney to Board of Commissioners, dated September 7, 1971, and marked as Exhibit 2 to this Affidavit.

8. The statutory definition of garbage has been interpreted by the Washoe County District Board of Health to include any trash which has come into contact with food. By this definition, and the granting of a monopoly to Independent Sanitation, Speedy Pick-Up Service is in violation of the exclusive franchise granted to Independent Sanitation any time that construction workers leave food wrappers in with the construction site debris.

9. Through operation of the Lockwood Dump and the Reno Transfer Station, sister companies of Independent Sanitation monitor all trash delivered by any competitor to Independent Sanitation and Reno Disposal. This position allows Independent Sanitation to monitor any attempt to compete with it.

10. A Reno City Ordinance (5.28.040) prohibits the transport of any garbage within the City of Reno, thereby making any person who

delivers their own garbage to the Reno Transfer Station in violation of Reno City Ordinances. Copy of Ordinanee 5.28.040 attached as Exhibit 3.

11. I was present at the Washoe County Council meeting at which the mandatory garbage collection ordinance was enacted. The several members of the council, as well as Carl Cahill, the Director of the Washoe County District Board of Health, stated that the main purpose of the ordinance was to eliminate illegal dumping in the unincorporated areas of the County.

12. If not prohibited by the County, Speedy Pick-Up Service would continue to offer service to citizens residing in the unincorporated portions of the County.

Executed on this 31st day of August, 1995.

/s/
CLARA FELLS

Subscribed and sworn before me,
a notary public, this 31st day
of August, 1995.

/s/
NOTARY PUBLIC

NO. 267523 DEPT. NO. 4

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

INDEPENDENT SANITATION,
a copartnership,

Plaintiff,

vs.

ELLIS R. FELLIS, doing
business as SPEEDY'S
PICK UP SERVICE,

Defendant.
_____/

COMPLAINT

Plaintiff alleges:

I

That at all times herein mentioned, plaintiff, INDEPENDENT SANITATION, was and still and now is a copartnership consisting of SAMUEL CARAMELLA, JACK B. CARAMELLA, JULIUS BALLARDINI, BEN CARAMELLA and LAWRENCE F. DEVINCENZI.

EXHIBIT 1

II

That at all times herein mentioned, the defendant, ELLIS R. FELLIS, has been an individual doing business under the firm name and style of "SPEEDY'S PICK UP SERVICE" in the County of Washoe, State of Nevada.

III

That on or about May 15, 1967, the County of Washoe, a political subdivision of the State of Nevada, entered into a written agreement with plaintiff herein under the terms and provisions of which, said County of Washoe granted to plaintiff the exclusive franchise for the operation of a garbage and trash collection and disposal service within the unincorporated areas of Washoe County, excluding therefrom the areas of Incline Village General Improvement District and the Horizon Hills General Improvement District, which said agreement provided that the franchise thereby granted should continue for a period of ten (10) years from the date thereof, subject to the right and option of plaintiff to renew the same for an additional period of ten (10) years. That said agreement is in full force and effect and plaintiff has at all

times fully complied with and performed all the terms and conditions thereof.

IV

That the defendant, ELLIS R. FELLIS, doing business as SPEEDY'S PICK UP SERVICE, his agents, servants and employees have since the granting of said franchise to plaintiff collected, hauled and disposed of garbage and trash in the unincorporated areas of Washoe County covered by said plaintiff's franchise in violation of plaintiff's exclusive rights under the franchise agreement hereinabove referred to; that plaintiff is informed and believes and upon such information and belief alleges that if plaintiff is not granted the relief requested herein, the defendant will continue to collect, haul and dispose of garbage and trash in violation of plaintiff's exclusive rights to do so in the unincorporated areas of Washoe County covered by said franchise agreement.

V

That as a proximate result of defendant's actions, plaintiff has lost customers and accounts for the collection of garbage and trash in

the unincorporated areas of Washoe County specifically covered by the franchise agreement hereinabove referred to; that plaintiff is informed and believes and upon such information and belief alleges that as a proximate result of defendant's actions, plaintiff has lost profits in excess of the

WASHOE COUNTY
COURTHOUSE
RENO, NEVADA 89505

Robert E. Rose
District Attorney

September 7, 1971

Board of Commissioners
of Washoe County
Courthouse
Reno, Nevada

Re: Independent Sanitation Co. Garbage Franchise

Gentlemen:

An opinion has been requested from this office concerning the validity of an exclusive garbage and trash franchise awarded to Independent Sanitation Co. by Washoe County in 1967.

Because the Commissioners are familiar with the background of the award of the franchise, this opinion will not review in detail the minutes leading to the award. However, it has been argued that the award of the franchise is invalid because of a lapse of more than thirty (30) days between the "Invitation to Bid" and the award of the franchise. This argument is based upon a misinterpretation of Ordinance No. 135 and is therefore invalid. Ordinance No. 135, Sec. 3(d) provides that the Board may not grant the franchise in "less that thirty (30) days after the publication of the "Invitation to Bid'..." This means that the Board may grant the franchise more than thirty (30) days after publication of the "Invitation to Bid" but may not grant it within the thirty (30) day period.

It has also been contended that the agreements entered into between

Independent Sanitation Co. and Mr. Hulbert of Lake Tahoe and Mr. Franchi of Verdi violate paragraph 11 of the franchise agreement prohibiting assignment, sale or transfer of any portion of the franchise. This theory is incorrect, since these agreements were entered into propr to the execution of the agreement and were specifically made a condition of the award of the franchise at the meeting of February 27, 1967. In other words, at the direction of the Board, these agreements were entered into prior to the effective date of paragraph 11 of the franchise agreement and are not covered thereby.

It is the opinion of this office that Washoe County is bound by the franchise agreement and may not, four-and-one-half (4½) years after it was awarded, unilaterally declare the franchise void, as it pertains to garbage collection and disposal, for procedural irregularities in its award. If such irregularities existed, Washoe County is as much to blame as Independent Sanitation Co., which is and has invested capital and operated for four-and-one-half (4½) years in reliance on the franchise. By its granting of the franchise with full knowledge of the facts, Washoe County waived any procedural irregularities and is estopped from now terminating the franchise on those grounds. To do so would, in the opinion of this office, subject the County to liability for substantial damages, including, but not limited to, a claim for profits for the remaining five-and-one-half (5½) years of the franchise.

It appears to this office that certain provisions of the franchise agreement have been breached by Independent Sanitation Co., as follows:

1. Paragraph 4, providing for monthly payment of the franchise fee has not always been observed.

2. Paragraph 5, providing for an annual statement of all customers of Independent Sanitation Co., attested as being correct by a representative of the company, has not been observed. At any rate, this office has been unable to find such a statement on file with the County.

3. Although no breach of paragraph 6, concerning rates, is clearly shown, this office would recommend that the County Manager review with Independent Sanitation Co., their practices with regard to rates for trash collection to determine if such practices are in accordance with the agreement.

4. Paragraph 7 requires the posting of a penal bond in the sum of $10,000.00. This office has received a letter dated August 31, 1971, from Comstock Insurance Agencies, Inc., stating that the bond is in full force and effect and the premium has been paid for the anniversary period of 4-30-71 to 4-30-72. However, it is recommended that the County request that a bond renewal certificate be filed with the Clerk annually.

It is recommended that, pursuant to the direction of the Board, this office immediately send a letter to Independent Sanitation Co., demanding that within ten (10) days, Independent Sanitation Co., begin the work of compliance, in accordance with paragraph 13 of the agreement. Clearly, in view of the provisions of paragraph 13, requiring written notice of breach and demand for compliance, the breaches of the agreement set forth above do not justify unilateral termination of the agreement by the County.

It is the opinion of this office that the exclusive franchise agreement is void insofar as it purports to grant and exclusive franchise for the collection and disposal of trash. NRS 244.187, Washoe County Ordinance No. 135 and the "Invitation to Bidders" for the franchise all refer to and are limited to collection and disposal of garbage. Only the franchise agreement, prepared by the attorneys for Independent Sanitation Co., refers to trash collection and disposal. It is the opinion of this office that the Board of Commissioners are empowered only to grant an exclusive franchise for garbage collection and disposal and not trash. Therefore, the County is without power to deny applications for business licenses for trash collection based upon the existence of an exclusive franchise for trash collection.

Very truly yours,
Chan G. Griswold
Chief Civil Deputy

CGG:am

5.28.040 Exclusive right to collect garbage in city. The city, its duly authorized agents, servants, employees or contractees, or the agents or employees of any such contractees, shall have the exclusive right to gather and collect and haul garbage within the city, and it shall be unlawful for any person to collect, dispose of or transport, carry or convey through the streets, alleys or public thoroughfares of the city, any garbage or to collect or dispose of same. (Prior Code §9-48 (part)).

EXHIBIT 3

APPENDIX G

MARC PICKER, ESQ., LTD.
417 West Plumb Lane
Post Office Box 3344
Reno, NV 89504
(702) 324-4533

Attorney for Individuals for
Responsible Government, Inc.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

* * *

INDIVIDUALS FOR RESPONSIBLE GOVERNMENT INC., a non-profit Nevada corporation; JANICE BUSE, HILARY BURSON, and JUNE LINK, individuals,	Case No. CV-N-94-526-ECR
Plaintiffs,	
vs.	**AFFIDAVIT OF JANICE BUSE IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND**
WASHOE COUNTY BY AND THROUGH THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF	

WASHOE, CHAIRMAN DIANNE CORNWALL, VICE CHAIRMAN LARRY BECK, MCDOWELL, STEVE BRADHURST; and INDEPENDENT SANITATION CO., INC., a Nevada corporation,

Defendants.

_____/

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

Comes now JANICE BUSE, being duly sworn, deposes and says:

1. I have resided and continue to reside at 11325 Chestnut Street, in the unincorporated area of Washoe County, since 1979.

2. I was present at a meeting before the Washoe County District Board of Health (see article with McIntyre, county manager) regarding the recently enacted mandatory collection ordinance held in 1992. The several members of the Board, as well as Carl Cahill, the Director of the Washoe County District Board of Health, stated that the main purpose of the ordinance was to eliminate illegal dumping

in the unincorporated areas of the County. Also attached as Exhibit 1 is a copy of a news article dated March 27, 1995, written by Steven Brown, the then Chairman of the Washoe District Board of Health, and published in the Reno Gazette-Journal, citing illegal dumping as a primary reason for the adoption of a mandatory garbage ordinance.

3. In response to citizen protests, an Illegal Dumping Task Force was established by the Washoe County Commission to seek to educate to the public as to the need for proper disposal of trash and garbage and to seek the assistance of the public, the law enforcement and health authorities and the judiciary to enforce the anti-dumping ordinances and statutes.

4. I served as a member of the Task Force appointed by the Washoe County Council. A true and correct list of the Task Force membership, along with agendas from the July 22 and August 20, 1992 meetings, and a summary of the July 22, 1992 meeting dated July 23, 1995, are attached as Exhibit 2 to this Affidavit. A primary purpose of the Task Force was to develop means to reduce the illegal dumping of garbage and trash in the County. The Task Force

organized citizen watch programs to assist law enforcement and health officials in apprehending those responsible for the illegal dumping.

5. Task Force members met with law enforcement and judicial officials to ensure that the efforts of private citizens to undertake a significant role in eliminating or reducing illegal dumping would be met with proper enforcement actions. Task Force members were assured by both judicial and enforcement personnel that the full measure of penalties provided by law would be sought in all cases of illegal dumping.

6. News articles relating to the enforcement of anti-dumping statutes and ordinances are attached and included as Exhibit 3 to this Affidavit. None of the individuals apprehended received a fine exceeding one-half of the maximum fine allowed by law (Reno Gazette-Journal, April 14, 1995, page 1A).

7. The Task Force has not met in over one year, and the County has shown little further interest in the enforcement and prosecution of its anti-dumping ordinances or the state laws on this matter.

8. Attached is a true and correct copy of a news article from the

Reno Gazette-Journal, dated May 21, 1994, which lists the location of six known illegal dumps within Washoe County, and details the failure of the County to take effective action to enforce its ordinances or the state laws on dumping. This article is written several years after the initiation of mandatory trash collection service, which was supposed to remove this blight from our desert.

9. Attached to this Affidavit as Exhibit 4 is a news article dated July 24, 1991, from the Reno Gazette-Journal as to the imposition of a $1.25 per month fee for the collection of curbside recycling. This fee is included in the regular quarterly billings from Independent Sanitation, regardless of any use of the collection service. As I take all of my recyclable materials into the recycling centers for my own use or donate recyclables to charitable organizations, I have not used this service and do not intend to use this service. Consequently, Independent Sanitation bills me every quarter for the privilege of retaining my own property.

Executed on this 31st day of August, 1995.

/S/
JANICE BUSE

Subscribed and sworn before me,
a notary public, this 31st day
of August, 1995.

/S/
NOTARY PUBLIC

One Man's View

Stop illegal dumping, get garbage picked up

By Steven Brown
Chairman, Washoe District Board of Health

Managing our solid waste is one of the major issues facing local government in the 1990s.

There is a critical need to protect our environment and quality of life. We should all be outraged by the illegal dumping that occurs on t he public lands of our county.

The illegal dumping of household garbage is not only an eyesore, but an environmental and health disaster. These sites are a breeding ground for vermin and rodents spreading disease. This dumping may ultimately contaminate groundwater many of us depend upon for domestic purposes.

Who pays for the cleanup of this illegal dumping? You and I do! When the U.S. Forest Service and the BLM clean up these sites, it is our tax dollars being spent. Several of these sites may require monitoring for years. Again, you and I will foot the bill.

In 1991, the District Health Department adopted a Solid Waste Management Plan for Washoe County to respond to these concerns. In the plan there was a recognition for the need to adopt an ordinance establishing mandatory garbage collection within specified unincorporated areas of the county.

Most of the unincorporated population is concentrated in neighborhoods with densities similar to Reno and Sparks. The cities of Reno and Sparks have had mandatory collection since 1966. The Incline Village General Improvement District has had mandatory service from its inception.

Three-quarters of the households in the specified unincorporated

EXHIBIT 1

area currently have weekly collection. The majority of those households subscribe to the highest level of service.

There has been a lot of talk about rights and mandatory service. What about the rights of the majority of those households that currently have collection? Don't they have a right to a neighborhood and community free of the degradation of illegal dumping? With rights come responsibilities. A responsibility to our neighbors and community.

The real issue here is finding the most cost-effective and efficient way to deal with the illegal dumping and the debasing of our environmental and community health standards.

It is obvious that all households do not generate a like amount of garbage on a weekly basis. The current proposal allows for three levels of service. The basic service will be one can per week.

With mandatory service, residents will be entitled to the free disposal of large items such as furniture and appliances at the landfill. Additionally, the franchisee will continue to support community-based cleanup projects.

There are other benefits of a mandatory service to our community:

- It will reduce and stabilize the cost of waste removal.
- It will benefit recycling efforts by consolidating the waste stream and establishing a collection process.
- It will reduce spillage and litter from improperly covered self-haul vehicles.
- It will reduce traffic to the transfer station and the landfill, resulting in a net reduction in vehicle air pollutants.

Let's do the right thing.

EDUCATION SUBCOMMITTEE

Lois Aicholtz
Elizabeth Anderson
Carl R. Cahill
Alicia Crisman
David Farside
Pat Fladager
Mark Franchi
Linda Jones
Linda Mitchell
Russell Mix
"J" Parker
Lorna Price
Norman Rosenberg
Susan Skinner
Vernon Stallard

EXHIBIT 2

ENFORCEMENT SUBCOMMITTEE

Hilary Burson
Janice Buse
Karla Butko
Rick Dougherty
Gregg Finkler
Jim Ganyon
Skip Houk
Jeanne Johnson
Rich Kishpaugh
Clyde Murray
Dave Patula

CLEAN UP GROUP

Joe Canfield
David Freitas
Robert Mays
Bob Schultz

ILLEGAL DUMPING TASK FORCE
AGENDA
July 22, 1992
5:30 pm

1) Introduction
2) Large Group vs. Action Groups
3) Establish goals and action plans
4) Adjourn 7 pm

WASHOE COUNTY
"To Protect and To Serve"

OFFICE OF THE COUNTY MANAGER — 1001 E. 9th STREET
POST OFFICE BOX 11130
RENO, NEVADA 89520-0027
PHONE (702) 328-2000

July 23, 1992

TO: Illegal Dumping Task Force
From: JOHN SHERMAN
Subject: July 22, 1992 Meeting

After introductions and reason for bringing the group together, members of the Task Force spent some time on a brainstorming session regarding possible solutions to the problem of illegal dumping. The following points were discussed.

- Incentives: free pickup with clean up
- Enforcement
- Identification: service people, neighbors
- Pictures of illegal dumpers in paper
- Location of illegal dumps: public property, private property
- Types of trash/garbage: household waste, furniture, lawn clippings, junk cars, etc.
- SPPC: neighborhood watch program
- Junk Car hauling program in Sun Valley as model
- Education
- Prevention
- Nevada Revised Statutes: fire danger on lots; bill on property tax
- Work with media
- Need to know statutes/ordinances
- People from local area need to know CC&R's and their impact; who enforces
- Mechanism for removing junk cars

- Public service announcement against illegal dumping
- Educate Municipal and Justice Court Judges on issue
- Guidelines for making a complaint
- Bureau of Land Management fines for illegal dumping too low

Subsequent to the brainstorming session, the Task Force divided into three working groups: Cleanup, Education and Enforcement.

CLEAN UP

Focus: hands on programs; quarterly "field work"

Goals:
- Design Program for October adopt a spot
- Honor camp/kids at risk/jail/Wittenberg Hall for cleanups
- Coordinating manpower

EDUCATION

Focus: program(s) to enhance clean culture

Goals:
- Complete homework assignments for next meeting

ENFORCEMENT

Focus: what works; bring facts together; coordination

Goals:
- Standardize reporting form used by enforcement agencies (police, sheriff, health dept., zoning enforcement)
- Improve District Health Dept. follow up
- Increase citizen reporting without becoming a police state
- Publication of offenders/enforcement efforts/penalties
- Use alternative sentencing for offenders
- Improve coordination between District Attorney efforts with City

Attorney's

NOTE...NOTE...NOTE...NOTE...

Each group will be meeting separately in the Caucus room on the following dates:

- Clean up: July 29 @ 1 pm
- Enforcement: August 5 @ 5:30 pm
- Education: August 10 @ 5:30 pm

These meetings will be used to refine the goals/objectives of each area of interest and to develop action plans. The next meeting of the entire Task Force will be held in the Caucus room on August 26 at 5:30 pm.

WASHOE COUNTY
"To Protect and To Serve"

OFFICE OF THE COUNTY MANAGER 1001 E. 9th STREET
POST OFFICE BOX 11130
RENO, NEVADA 89520-0027
PHONE (702) 328-2000

August 20, 1992

TO: Illegal Dumping Task Force
From: John Sherman
Subject: August 26, 1992 Meeting

Please find attached the agenda for the August 26, 1992 meeting of the Illegal Dumping Task Force. Also inclosed for your information are:

- Selected Nevada Revised Statutes concerning illegal dumping.
- Information needed when reporting illegal dumping to the District Health Department.
- District Health Department definition of illegal dumping.
- Information on Wester Nevada Clean Communities, Inc.
- Reno Gazette-Journal editorial on littering.

ILLEGAL DUMPING TASK FORCE
AGENDA
August 26, 1992
5:30 pm

Reports from subcommittees
Identification of Task Force goals and action plans
Future direction: what next?
Adjourn 7 pm

202.180 Deposit of unwholesome substance; carrying on business detrimental to public health on or near route of public travel.

Every person who:

1. Shall deposit, leave or keep, on or near a highway or route of public travel, on land or water, any unwholesome substance;

2. Shall establish, maintain or carry on, upon or near a highway or route of public travel, on land or water, any business, trade or manufacture which is detrimental to the public health; or

3. Shall deposit or cast into any lake, creek or river, wholly or partly in this state, the offal from or the dead body of any animal;

shall be guilty of a gross misdemeanor.

202.185 Unlawful deposit of dead animal, dirt, garbage or rubbish on public highway; penalty.

1. As used in this section:

(a) "Dead animals" means all dead animals or parts thereof, including condemned meats, not intended to be used as food.

(b) "Dirt" includes loose earth, ashes, manure from barns, stables, corrals and pens, offal from butcher houses and slaughterhouses, and all foul and

public highway, any dead animal, dirt, garbage or rubbish as defined in subsection 1.

3. Any person violating the provisions of this section shall be guilty of a misdemeanor.

COLLECTION AND DISPOSAL OF SOLID WASTE

444.440 Declaration of state policy. It is hereby declared to be the policy of this state to regulate the collection and disposal of solid waste in a manner that will:

1. Protect public health and welfare.
2. Prevent water or air pollution.
3. Conserve natural resources.
4. Enhance the beauty and quality of the environment.

444.583 Unlawful disposal of motor vehicle battery, motor vehicle tire or motor oil; penalty; plan for appropriate disposal; exemption.

1. Except as otherwise provided in subsection 5, it is unlawful willfully to:

(a) Dispose of, abandon or dump a motor vehicle battery, motor vehicle tire or motor oil at any site which has not been issued a permit for that purpose by the state department of conservation and natural resources;

(b) Dispose of, abandon or dump a motor vehicle battery, motor vehicle tire or motor oil at a sanitary landfill or other disposal site established by a municipality which has not been issued a permit for that purpose by the state department of conservation and natural resources; or

(c) Incinerate a motor vehicle battery or motor vehicle tire as a means of ultimate disposal, unless the incineration is approved by the department for the recovery of energy or other appropriate use.

2. A person who violates the provisions of subsection 1 is guilty of a misdemeanor and shall be punished by a fine of not less than $100 per violation.

3. The department shall establish a plan for the appropriate

disposal of used or waste motor vehicle batteries, motor vehicle tires and motor oil. The plan must include the issuance of permits to approve sites of facilities for the disposal of those items by the public. The plan may include coordination ~~with the~~ office of community service within the governor's office for the education of the public regarding the necessity of disposing of these items properly and recycling them.

4. The department shall encourage the voluntary establishment of authorized sites which are open to the public for the deposit of used or waste motor vehicle batteries, motor vehicle tires and motor oil.

5. The provisions of subsections 1 and 2 do no apply to the disposal of used or waste motor vehicle batters or motor vehicle tires if the unavailability of a site that has been issued a permit by the state department of conservation and natural resources makes disposal at such a site impracticable. The provisions of this subsection do not exempt a person from any other regulation of the department concerning the disposal of used or waste motor vehicle batteries or motor vehicle tires.

UNLAWFUL DISPOSAL OF GARBAGE OR SEWAGE

444.630 Penalty; enforcement; identification of violator.

1. As used in this section, "garbage" includes swill, refuse, cans, bottles, paper, vegetable matter, carcass of any dead animal, offal from any slaughter pen or butcher shop, trash or rubbish.

2. Every person who willfully places, deposits or dumps, or who causes to be placed, deposited or dumped, or who causes or allows to overflow, any sewage, sludge, cesspool or septic tank effluent, or accumulation of human excreta, or any garbage, in or upon any street, alley, public highway or road in common use, or upon any public park or other public property other than property designated or set aside for such a purpose by the governing body having charge thereof, or upon any private property into or upon which the public is admitted by easement, license or otherwise, is guilty of a misdemeanor and, if the convicted person agrees, he shall be sentenced to perform 10 hours of work for the benefit of the community under the conditions prescribed

in NRS 176.087.

3. Except as otherwise provided in NRS 444.585, ownership of garbage does not transfer from the person who originally possessed it until it is received for transport by a person authorized to dispose of solid waste pursuant to this chapter or until it is disposed of at a municipal disposal site. Identification of the owner of any garbage which is disposed of in violation of subsection 2 creates a reasonable inference that the owner is the person who disposed of the garbage. The fact that the disposal of the garbage was not witnessed does not, in and of itself, preclude the identification of the owner.

4. All health officers, game wardens, police officers of cities and towns, sheriffs and their deputies, and other peace officers of the State of Nevada shall, within their respective jurisdictions, enforce the provisions of this section.

5. A district health officer or his deputy may issue a citation for any violation of this section which occurs within his jurisdiction.

6. To effectuate the purposes of this section, the persons charged with enforcing this section may request information from any:

(a) Agency of the state or its political subdivisions.

(b) Employer, public or private.

(c) Employee organization or trust of any kind.

(d) Financial institution or other entity which is in the business of providing credit reports.

(e) Public utility.

Each of these persons and entities, their officers and employees, shall cooperate by providing any information in their possession which may aid in the location and identification of a person believed to be in violation of subsection 2. A disclosure made in good faith pursuant to this subsection does not give rise to any action for damages for the disclosure.

SANITATION

444.635 Civil penalties; collection; use of money restricted

1. Any person convicted of violating NRS 444.555 and, in

addition to the penalty imposed in NRS 444.583 or 444.630, any person convicted of violating NRS 444.583 or 444.630 is liable for a civil penalty, upon each such conviction.

2. Every court, before whom a defendant is convicted of a violation of NRS 444.555, 444.583 or 444.630, shall order the defendant to pay a civil penalty which is at least $250 but not more than $2,000. If so provided by the court, the penalty may be paid in installments.

3. The health authority or division of environmental protection of the state department of conservation and natural resources may attempt to collect all such penalties and installments which are in default in any manner provided by law for the enforcement of a judgment.

4. Each court which receives money under the provisions of this section shall forthwith remit the money to the division of environmental protection or, if the health authority initiated the action, the district health department which shall deposit the money with the state treasurer for credit in a separate account in the state general fund or with the county treasurer for deposit in an account for the district health department, as the case may be. Money so deposited must be used only to pay rewards pursuant to NRS 444.640 or for the management of solid waste and paid as other claims against the state or local governments are paid.

(Added to NRS by 1987, 1490; A 1991, 673)

444.640 Reward for information leading to arrest and conviction of violator; regulations

1. The division of environmental protection of the state department of conservation and natural resources or the district health department shall offer a reward, in an amount equal to 50 percent of the civil penalty imposed pursuant to NRS 444.635, for information leading to the arrest and conviction of any person violating NRS 444.555 or 444.630. The reward must be paid upon his conviction and the payment in full of the penalty. The reward must be distributed equally among the persons who supplied the information which led to the arrest and conviction.

2. The state environmental commission or district board of health may adopt regulations necessary to carry out the provisions of this section.

TRAFFIC LAWS

484.397 Police officer authorized to remove certain vehicles

1. Whenever any police officer finds a vehicle standing upon a highway in violation of any of the provisions of this chapter, such officer may move such vehicle, or require the driver or person in charge of the vehicle to move it to a position off the paved or improved or main-traveled part of such highway.

2. Whenever any police officer finds a vehicle unattended upon any highway, bridge or causeway, or in any tunnel where such vehicle constitutes an obstruction to traffic, such officer may provide for the removal of such vehicle in any manner provided by law.

3. Any police officer may remove any vehicle or part of a vehicle found on the highway, or cause it to be removed, to the nearest garage or other place of safekeeping if:

(a) The vehicle has been involved in an accident and is so disabled that its normal operation is impossible or impractical and the person or persons in charge of the vehicle are incapacitated by reason of physical injury or other reason to such an extent as to be unable to provide for its removal or custody, or are not in the immediate vicinity of the disabled vehicle;

(b) The person driving or in actual physical control of the vehicle is arrested for any alleged offense for which the officer is required by law to take the person arrested before a proper magistrate without unnecessary delay; or

(c) The person in charge of the vehicle is unable to provide for its custody or removal within:

(1) Twenty-four hours after abandoning the vehicle on any freeway, United States highway or other primary arterial highway.

(2) Seventy-two hours after abandoning the vehicle on any other highway.

484.465 Putting glass or other injurious substance on highway prohibited

1. No person shall throw or deposit upon any highway any glass bottle, glass, nails, tacks, wire, cans or any other substance likely to injure any person, animal or vehicle upon such highway.

2. Any person who drops, or permits to be dropped or thrown, upon any highway any destructive or injurious material shall immediately remove the same or cause it to be removed.

3. Any person removing a wrecked or damaged vehicle from a highway shall remove any glass or other injurious substance dropped upon the highway from such vehicle.

REPAIR, REMOVAL AND DISPOSAL OF VEHICLES ABANDONED VEHICLES

487.205 Legislative findings and declaration

1. The legislature finds that:

(a) Abandoned vehicles constitute a safety hazard and a public nuisance and are detrimental to the health, safety and welfare of the general public.

(b) Such vehicles produce scenic blight which degrades the environment and adversely affects the proper maintenance and continuing development of the state.

(c) Such vehicles represent a resource out of place, requiring state and local governmental attention in order to ensure their expeditious removal and recycling.

2. The legislature declares that the policy of this state is:

(a) To prohibit the abandonment of vehicles and to enforce such prohibition with adequate penalties.

(b) To encourage the development of procedures and operational techniques which will facilitate the expeditious removal of abandoned vehicles from public and private premises.

(c) To encourage state and local governmental units, in cooperation with the private sector to recover the resource represented by abandoned vehicles to the fullest extent practicable.

487.220 Person responsible for cost of removal and disposition of abandoned vehicles; presumption vehicle abandoned by registered owner

1. Every person who abandons a vehicle is responsible for the cost of removal and disposition of such vehicle.

2. An abandoned vehicle is presumed to have been abandoned by the registered owner thereof. The registered owner may not rebut this presumption by showing that he transferred his interest in the abandoned vehicle unless he complied with the provisions set forth in NRS 482.399 to 482.420, inclusive.

487.230 Removal of abandoned vehicles

1. Any sheriff, constable, member of the Nevada highway patrol, officer of the legislative police, investigator of the bureau of enforcement of the registration division of the department, designated employees of the manufactured housing division of the department of commerce, special investigator employed by the office of any district attorney, marshal or policeman of any city or town who has reason reason to believe that a vehicle has been abandoned on public property in his jurisdiction may remove the vehicle from that property. At the request of the owner or person in possession or control of any private property who has reason to believe that a vehicle has been abandoned on his property, the vehicle may be removed by the operator of a tow car or an automobile wrecker from that private property.

2. Any person who authorizes the removal of an abandoned vehicle pursuant to subsection 1 shall:

(a) Have the vehicle taken to the nearest garage or other place designated for storage by:

(1) The state agency or political subdivision making the request, if the vehicle is removed from public property.

(2) The owner or person in possession of the property, if the vehicle is removed from private property.

(b) Make all practical inquiries to ascertain if the vehicle is stolen by checking the license plate number, vehicle identification number and any other available information which will aid in identifying the registered and legal owner of the vehicle and supply the information to

the person who is storing the vehicle.

487.281 Unlawful abandonment of vehicle

1. A person shall not abandon a vehicle upon any public highway or road.

2. A person shall not abandon a vehicle upon public or private property without the express or implied consent of the owner or person in lawful possession or control of such property.

487.290 Unlawful possession of unregistered vehicles unfit for use; exceptions

1. Unless he first obtains a license pursuant to NRS 487.050 or 487.410, a person shall not for any reason keep more than two unregistered vehicles on real property owned by him or under his possession or control if the vehicles are no longer intended for or in condition for lawful use on the highway.

2. The provisions of subsection 1 do not apply to:

(a) Premises used by a licensed dealer, manufacturer, distributor or rebuilder.

(b) Vehicles to be restored or used as a source of parts in conjunction with the operation or maintenance of a fleet of vehicles for the carriage of persons or property.

(c) Premises used as a farm, ranch, mine or repair shop for motor vehicles.

(d) Any person engaged in the restoration of one or more vehicles entitled to registration as a Horseless Carriage or otherwise having classic or historic significance.

HUNTING, FISHING AND TRAPPING

503.430 Water pollution: Deposit of substance deleterious to fish or wildlife; penalties. Except as otherwise provided in NRS 445A.615 or unless a greater penalty is prescribed by NRS 459.600, every person who places or allows to pass, or who places where it can pass or fall, into or upon any of the waters of this state at

any time, any lime, gas tar, slag, acids or other chemical, sawdust, shavings, slabs, edgings, mill or factory refuse, sewage, garbage or any substance deleterious to fish or wildlife is guilty of a misdemeanor for the first offense and a gross misdemeanor for any subsequent offense.

Reno Gazette-Journal Sunday, August 16, 1992

Now's the time to take pride and clean up this community

(Editorial opinion)

FIRST DRAFT: ILLEGAL DUMPING BROCHURE (TOPICS, TONE)

What about regular household garbage service?
All areas within Washoe County have a special arrangement with a waste hauler to provide garbage service to each home. For your weekly curbside pick-up, if you live in:

Sparks, residents use the large wheeled toters provided by Sparks Sanitation. You may place it along with one extra cubic yard of boxed, bagged, or bundled waste on your curb each week for pickup.

Reno, you may place one tightly-covered can plus one cubic yard of boxed, bagged or bundled waste at your curbside each week.*

Incline Village, you may place one tightly-covered can plus one cubic yard of boxed, bagged or bundled waste at your curb each week.*

Washoe County, they will collect one tightly-covered can full of household garbage each week.*

*Extra service such as arranging for the pick-up of large amounts of yard waste, or obtaining a large wheeled container are options available to you.

To arrange for service, call:

Incline Village	Independent Sanitation	831-2971
Reno	Reno Disposal	329-9955
Sparks	Sparks Sanitation	329-8822
Washoe County	Disposal Services, Inc.	329-8822

What if I want to recycle?

As part of every household garbage service plan, residents may participate in curbside recycling. RSW Recycling provides each residence with recycling bins, and will pick up recyclables every two

weeks with their special trucks according to your neighborhood schedule. Here's what's taken in curbside recycling:

Green Bin: Glass (Any color, free of food wastes, with labels, no lids)

Yellow Bin: Aluminum Cans
Tin Cans
Plastic Bottles
(Free of food wastes, with labels, no lids)

Newspapers and Magazines: Should be put in a grocery sack and placed on top of the yellow bin.

Other recycling and redemption centers exist in Washoe County, such as newspaper collection boxes which benefit various local agencies. Please consult the Nevada Bell phone directory or call Western Nevada Clean Communities for more information and locations.

I've got some big, bulky stuff to get rid of. Where can I do that?

If it's in good condition, think about selling or donating it. If not, then take advantage of the free dumping offered!

Free Dumping:
for household appliances, like washers, dryers, refrigerators, water heaters,
plus mattresses, box springs, and sofas.
Where:
Lockwood Landfill, anytime. Open 7 days a week, from 8:00 until 4:30
Transfer Stations, first weekend in January, April, July, and October

How do I get rid of this old car? Isn't it expensive?

No! Is it on private property that you own or occupy? Do you have the title? Then call an auto wrecking company. Depending on the vehicle's condition and location, they may pick it up for free. If there's no title, then it may cost you a grand total of $15 to the Department of

Motor Vehicles to take care of it. The wrecking company will guide you through the process and provide a free cost estimate.

And these tires?

250,000 tires are generated as waste in our county every year. They are accepted at the Lockwood Landfill and at the Transfer Stations for a small fee. For a regular car tire, at press time, the fee is $.31 each at Lockwood and $.62 at the Transfer Stations. When you replace your tires, the best thing to do is leave the old ones with your tire dealer.

What about Building Materials?

Wood

Wood can be recycled. There are several wood recyclers currently in operation in Wash[illegible]e County -- check the Clean Line for details. The folks at Lockwood Landfill will take clean wood (not a lot of nails or other things attached) for free. They grind it up for use in a clean-burning energy generation facility.

Construction Materials

If you're planning a special project, contact your disposal company to make arrangements to rent a large waste container. Local agencies may also be accepting donations of surplus materials in good condition for use in various community projects. Such gifts may be considered a tax deduction. Call the Clean Line!

I've also got some old paint, motor oil, and other things to get rid of.

Motor oil, antifreeze, paint, car batteries, and many other wastes are considered hazardous and must be handled carefully. They pose a big threat to the quality of our water, among other things, if disposed of improperly. Hazardous wastes are not accepted at the landfill, but there are some options for automotive fluids and paint. Motor Oil and antifreeze can be recycled, and there are convenient places to take it free

of charge. For old paint, open the can and allow it to dry, or paint it on an old board to use it up. Once dry or empty, it can be put into your regular garbage. Some groups are seeking donations of old paint as well; call the Clean Line for details!

If you have questions on proper disposal of other potential hazards, call the Nevada Hazardous Waste Hotline toll-free at 1-800-882-3233.

WANTED:
Your help to stop illegal dumping.
If you report an instance of illegal dumping,
and the report leads to a conviction,
then you may be eligible
for a reward.

To report illegal dumping, call your local sheriff
or police department, and the Washoe County
District Health Department at 328-2400
with the following information:
Location of dumping
License number of vehicle, if possible
Vehicle description
Suspect description
What is being dumped

COMMENTS? CALL ALICIA AT 328-3698. THANKS!

Reno Gazette-Journal

Today's Topic: Illegal Dumping

Desert stakeouts latest effort to curb violators

Sheriff's deputies issue warnings, citations at sites

(Newspaper article)

EXHIBIT 3

Reno Gazette Journal — Tuesday, April 14, 1992

County Government
Residents might haul own garbage

(Newspaper article)

Reno Gazette Journal — Friday, August 13, 1993

Firm gets tough about garbage pickup

(Newspaper article)

Reno Gazette-Journal — Friday, May 21, 1993

Environment
'Disgusting" illegal dumping under fire

(Newspaper article)

Reno Gazette-Journal — Thursday, September 16, 1993

Environment
Inmates clear illegal dumps on public land

(Newspaper article)

Reno Gazette-Journal Friday, April 14, 1995

(Newspaper article)

Reno Gazette Journal Wednesday, July 24, 1991

County to start recycling trash

(Newspaper article)

EXHIBIT 4

APPENDIX H

PERTINENT NEVADA REVISED STATUTES

244.187 Displacement or limitation of competition: Services

A board of county commissioners may, to provide adequate, economical and efficient services to the inhabitants of the county and to promote the general welfare of those inhabitants, displace or limit competition in any of the following areas:

1. Ambulance service.

2. Taxicabs and other public transportation, unless regulated in that county by an agency of the state.

3. Collection and disposal of garbage and other waste.

4. Operations at an airport, including but not limited to the leasing of motor vehicles and the licensing of concession stands, but excluding police protection and fire protection.

5. Water and sewage treatment, unless regulated in that county by an agency of the state.

6. Concessions on, over or under property owned or leased by the county.

7. Operation of landfills.

8. Construction and maintenance of benches and shelters for passengers of public mass transportation.

244.188 Displacement or limitation of competition: Areas in which authorized; methods; limitation

1. Except as otherwise provided in subsection 3, a board of county commissioners may, outside the boundaries of incorporated cities and general improvement districts:

(a) Provide those services on an exclusive basis or, by ordinance, adopt a regulatory scheme for controlling the provision of those services or controlling development in those areas on an exclusive basis; or

(b) Grant an exclusive franchise to any person to provide those services.

2. If services for the collection and disposal of garbage are

provided pursuant to subsection 1, the board of county commissioners may, except as otherwise provided in subsection 3, require owners of real property outside the boundaries of incorporated cities and general improvement districts to receive and pay for those services.

3. The board of county commissioners may exercise the authority provided in subsections 1 and 2 within the boundaries of a general improvement district if that district:

(a) Is not authorized to provide those services; and

(b) Includes any real property within 7 miles from the boundary of an incorporated city.

4. If an exclusive franchise is granted or a regulatory scheme is adopted for the mandatory collection and disposal of garbage and other waste, the initial boundaries of the collection area must be the same as the boundaries of an existing collection area under an exclusive franchise or regulatory scheme.

5. The board of county commissioners may expand the boundaries of a collection area established pursuant to subsection 4 after the board has:

(a) Conducted preliminary studies and determined that the proposed collection area is economically sound and feasible and promotes the health, safety and general welfare of the inhabitants of the county; and

(b) Held a public hearing on the proposed collection area after giving notice of the time and the place of the hearing in a newspaper of general circulation in that county. The notice must include the purpose of the hearing and describe the boundaries of the proposed collection area.

444.585 Ownership of recyclable materials; unauthorized collection of recyclable materials prohibited; penalty; civil remedy

1. From the time recyclable materials are placed in a container provided by a private recycling business or the person designated by the county or other municipality to collect recyclable materials:

(a) At curbside for collection; or

(b) At any other appropriate site designated for collection, the

recyclable materials are the property of the private recycling business or person designated by the county or other municipality to collect them, as appropriate.

2. Any person engaged in the unauthorized collection of recyclable materials is guilty of a misdemeanor. Each such unauthorized collection constitutes a separate and distinct offense.

3. As an alternative to the criminal penalty set forth in subsection 2, the county or other municipality, the private recycling business and the person designated to collect the recyclable materials may independently enforce the provisions of this section in a civil action. A person who engages in the unauthorized collection of recyclable materials is liable to the private recycling business or the person designated to make such collections, as appropriate, for three times the damages caused by the unauthorized collection.

PERTINENT WASHOE COUNTY ORDINANCES

SUMMARY: Establishes exclusive right to collect garbage within portions of unincorporated area of county and mandates use of garbage service within those areas.

BILL NO. 1013
ORDINANCE NO. 838

AN ORDINANCE AMENDING THE WASHOE COUNTY CODE BY ESTABLISHING AN EXCLUSIVE RIGHT TO COLLECT GARBAGE WITHIN THE PORTIONS OF THE UNINCORPORATED AREA OF THE COUNTY; MANDATING THE USE OF GARBAGE SERVICE WITHIN THOSE AREAS; AND PROVIDING OTHER MATTERS PROPERLY RELATED THERETO.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WASHOE DO ORDAIN:

SECTION 1. Chapter 90 of the Washoe County Code is hereby

amended by adding thereto the provisions set forth as Sections 2 and 3 and amending Section 4 of this ordinance.

SECTION 2.

90.035 Exclusive right to collect garbage.

1. Except as provided in subsection 2, the county, its duly authorized agents, servants, employees or contractees, or the agents or employees of any of those contractees, have the exclusive right to gather, collect and haul garbage within that part of the unincorporated area in which garbage is currently being gathered, collected and hauled and as that area may be expanded or contracted from time to time.

2. The right established pursuant to subsection 1 does not apply to the gathering, collection and hauling of garbage within a general improvement district which is authorized to provide that service unless the board of trustees of the district has contracted with the county to gather, collect and haul garbage on behalf of the district and within the district's boundaries.

SECTION 3.

90.037 Mandatory use of garbage service.

1. Every owner of real property who accumulates or causes the accumulation of garbage as defined in this chapter upon any premises in the area described in section 90.035 must subscribe to the collection, hauling and disposal of garbage pursuant to the provisions of this chapter.

2. For purposes of determining whether garbage service must be subscribed, it is presumed that every single-family dwelling, any building containing rooms for sleeping and overnight accommodations, every building or dwelling unit with a kitchen facility, and every business permits good and drink to be sold, serve or consumed upon the premises is accumulating or causing the accumulation of garbage upon the premises. Any owner or occupant of dwelling units or business establishments desiring to be exempt from garbage service, or claiming that garbage is not being accumulated upon the premises, must have the written approval of the district health officer, which approval shall not be granted except upon the showing that garbage, as defined by this

chapter, is not being accumulated upon the premises and that no attempt is being made to haul, bury or otherwise dispose of garbage in violation of Chapter 90.

SECTION 4.

90.060 Establishing residential rates.

1. For residential services, the franchise holder shall be entitled to collect a garbage collection fee based upon the following criteria:

(a) The charge for collection of garbage for residential areas shall be a weekly basis and shall include one "designated container." A "designated container" shall be equal to a container not to exceed a capacity of 32 gallons and 75 pounds in weight, or be a container approved by the franchise holder. The rate for residential service includes one designated container for garbage. The residential rate for each "designated container" shall include, at no additional cost, the removal of one cubic yard of rubbish or waster matter provided the same is secured in boxes, bundles, disposable plastic bags, and other such disposable eontainers which do not exceed 75 pounds in weight.

(b) When requested, the franchise holder shall provide more frequent collections on a regular basis, and the rate for such additional collections shall be agreed to in the same manner as commercial rates.

(c) The residential rate charged by the franchise holder shall require that the designated container with the permissible amount of rubbish or waster matter be placed behind the curb or on the edge of the alley by 7:00 a.m., on the regular collection day. The franchise holder shall be entitled to collect an additional charge for any additional containers of garbage, rubbish or waster matter which would be in addition to the regular residential service.

(d) All multiple dwelling buildings, including, but not limited to, duplexes, apartments, condominiums, cooperatives, mobile homes and trailer parks, and any other building or businesses containing multiple dwelling unites which buildings are not a single-family dwelling shall be charged the residential rate for each dwelling unit, and an additional charge for each dwelling unit requesting additional containers or services; provided, however, an owner of a multiple dwelling building

or business, by using dumpsters or equivalent containers may make application to the franchise holder to be charged in accordance with the rates for business establishments.

(e) There shall be a twenty (20) percent reduction in the residential rate for those persons who have been found eligible for a discount or refund by the Washoe County Assessor under the provisions of NRS 361.800 to 361.877, inclusive, and commonly referred to as the "Senior Citizens' Property Tax Assistance Act." Any such person shall be entitled to the reduced rate by making written application to the franchise holder and submitting written proof of the finding of eligibility by the Washoe County Assessor.

Proposed on the 8th day of October, 1991.
Proposed by Commissioners Beck.
Passed on the 18th day of November, 1991.

Vote:

Ayes: Commissioners: Beck, Cornwall, Leighton, McDowell & Reid.
Nays: Commissioners: None.
Absent: Commissioners: None.

Rene Reid
Chairman of the Board

ATTEST:
Judi Bailey
County Clerk

This ordinance shall be in force and effect from and after the 2nd day of December, 1991.

SUMMARY: Establishes a reduced level of garbage service within certain portions of the unincorporated area of county and provides for certain exemptions to garbage service.

BILL NO. 1023
ORDINANCE NO. 848

AN ORDINANCE AMENDING THE WASHOE COUNTY CODE PROVIDING FOR GARBAGE SERVICE WITHIN CERTAIN PORTIONS OF THE UNINCORPORATED AREA; PROVIDING FOR A REDUCED LEVEL OF GARBAGE SERVICE; PROVIDING FOR CERTAIN EXEMPTIONS TO SERVICE; AND, PROVIDING OTHER MATTERS PROPERLY RELATED THERETO.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WASHOE DO ORDAIN:

SECTION 1. Section 90.037 of the Washoe County Code is hereby amended by to read as follows:

90.037 Subscription to use of garbage service.

1. Every owner of real property who accumulates or causes the accumulation of garbage as defined in this chapter upon any premises in the area described in section 90.035 must subscribe to the collection, hauling and disposal of garbage pursuant to the provisions of this chapter, unless such person qualifies for an exemption pursuant to this section.

2. For purposes of determining whether garbage service must be subscribed, it is presumed that every single-family dwelling, any building containing rooms for sleeping and overnight accommodations, every building or dwelling unit with a kitchen facility, and every business which permits food and drink to be sold, served or consumed upon the premises is accumulating or causing the accumulation of garbage upon the premises. Any owner or occupant of dwelling units or business establishments desiring to be exempt from garbage service because garbage is not being accumulated upon t he premises must have the

written approval of the district health officer, which approval shall not be granted except upon the showing that garbage, as defined by this chapter, is not being accumulated upon the premises.

3. An owner or occupant of a residential dwelling unit may also receive an exemption from garbage service if he desires to haul and dispose of his own residential garbage or because an easily recognizable condition exists on the property that presents a significant hardship to the resident of the property or to the franchised collector in the normal process of curbside collection of garbage. Any owner or occupant wishing to be exempt from residential garbage service under these circumstances must obtain an exemption permit issued by the district health officer. Upon the issuance and acceptance of the exemption permit, the owner or occupant agrees to comply with all conditions, statutes, laws, codes and regulations applicable to storage, recycling, hauling and disposal of garbage, including the following:

(a) Garbage must be stored properly so as not to cause a health hazard, attract or propagate vectors, vermin, or pests, create unpleasant odors, or create nuisance.

(b) Garbage must be hauled to an approved disposal site not less than every 7 calendar days.

(c) Precautions are to be taken to prevent littering and nuisances at the loading point during transport and at the disposal site. This includes the requirement that the waste and the vehicle be tightly covered during transport to the disposal site.

(d) Upon approval of the exemption application, the individual may only haul his own residential waste matter and must not provide garbage service to any other person.

SECTION 2. Section 90.060 of the Washoe County Code is hereby amended by to read as follows:

90.060 Establishing residential rates.

1. For residential services, the franchise holder shall be entitled to collect a garbage collection fee based upon the following criteria:

(a) The charge for collection of garbage for residential areas shall be on a weekly basis and shall include one "designated container."

A "designated container" shall be a container with a maximum capacity of 32 gallons which does not exceed 75 pounds in weight, or be a container approved by the franchise holder.

(b) When requested, the franchise holder shall provide more frequent collections on a regular basis, and the rate for such additional collections shall be agreed to in the same manner as commercial rates.

(c) The residential rates charged by the franchise holder shall require that the designated container be placed behind the curb or on the edge of the alley by 7:00 a.m., on the regular collection day. The franchise holder shall be entitled to collect an additional charge for any additional containers of garbage, rubbish or waster matter which would be in addition to the regular residential service.

(d) All multiple dwelling buildings, including, but not limited to, duplexes, apartments, condominiums, cooperatives, mobile homes and trailer parks, and any other buildings or businesses containing multiple dwelling units which buildings are not a single-family dwelling, shall be charged the residential rate for each dwelling unit, and an additional charge for each dwelling unit requesting additional containers or services; provided, however, an owner of a multiple dwelling building or business, by using dumpsters or equivalent containers, may make application to the franchise holder to be charged in accordance with the rates for business establishments.

(e) There shall be a 20 percent reduction in the residential rate for those persons who have been found eligible for a discount or refund by the Washoe County assessor under the provisions of NRS 361.800 to 361.877, inclusive, and commonly referred to as the "Senior Citizens' Property Tax Assistance Act." Any such persons shall be entitled to the reduced rate by making written application to the franchise holder and submitting written proof of the finding of eligibility by the Washoe County assessor.

SECTION 3. Section 90.090 of the Washoe County Code is hereby amended to read as follows:

90.090 Collection procedures. The franchise holder shall be entitled to adopt and enforce the following billing procedures:

1. Billing for residential service shall be in advance for the

charges allowed by this code on a quarterly basis, and such charges shall be due and payable on the first day of each billing period. Franchisee is authorized to establish procedures for collecting delinquent accounts, including the right to collect security deposits.

2. Any owner or occupant of a residential dwelling unit who has obtained an exemption permit from the district health officer allowing that individual to haul and dispose of his own residential waste matter shall still be billed on a quarterly basis. Such owner or occupant, however, shall not be required to pay the amount billed if he submits to the franchise holder receipts or other proof showing that he has disposed of his garbage at an approved disposal site for each week within the previous quarter. Failure to show such proof of compliance shall result in entire bill being due and payable and may result in revocation of the exemption by the district health officer.

3. The franchise holder shall bill for commercial service in advance on a monthly basis, and such charges shall be due and payable on the first day of each billing period. The bill or charge for commercial service shall be delinquent if not fully paid on the last day of each monthly period.

Proposed on the 10th day of March, 1992.
Proposed by Commissioners Reid.
Passed on the 14th day of April, 1992.
Vote:

Ayes: Commissioners: Beck, Cornwall, McDowell & Reid.
Nays: Commissioners: None.
Absent: Commissioners: Leighton.

Gene McDowell
Chairman of the Board

ATTEST:
Judi Bailey
County Clerk

This ordinance shall be in force and effect from and after the 28th day of April, 1992.

CERTIFICATE OF SERVICE

Pursuant to Rule 29.2. of the Rules of the Supreme Court in compliance with 28 U.S.C. § 1746, I declare that I am the attorney of record for the Petitioners herein and that on this date I did cause to be deposited in the United States Mail, postage fully paid, a true and correct copy of the foregoing addressed to:

Frank Cassas, Esq.
Marshall Hill Casas & deLipkau
333 Holcomb Avenue, Suite 300
P.O. Box 2790
Reno, Nevada 89505

Melanie Foster, Esq.
Deputy District Attorney
P.O. Box 11130
Reno, Nevada 89520

DATED this 28th day of July, 1997.

MARC PICKER, ESQ.
ZEH, POLAHA, SPOO, HEARNE & PICKER
575 Forest Street, Suite 200
P.O. Box 3344
Reno, Nevada 89504
(702) 324-4533

Subscribed and Sworn to before me
this 28th day of July, 1997.

NOTARY PUBLIC

FILED
OCT 10

No. 97-269

In The

Supreme Court of the United States

October Term, 1996

INDIVIDUALS FOR RESPONSIBLE GOVERNMENT, INC., a non-profit Nevada corporation; JANICE BUSE; HILARY BURSON; JUNE LINK, individuals,

Petitioners,

vs.

WASHOE COUNTY, by and through the Board of County Commissioners of the County of Washoe; DIANNE CORNWALL, Chairman; LARRY BECK, Vice Chairman; GENE McDOWELL; STEVE BRADHURST; INDEPENDENT SANITATION CO., INC., a Nevada corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

FRANK CASSAS
MARSHALL HILL CASSAS
& de LIPKAU
Suite 300
333 Holcomb Avenue
P.O. Box 2790
Reno, Nevada 89505
(702) 323-1601

Attorneys for Respondent Independent Sanitation Co., Inc.

RICHARD A. GAMMICK
Washoe County District Attorney
GREGORY R. SHANNON
Counsel of Record
MELANIE FOSTER
Deputy District Attorney
P.O. Box 11130
Reno, Nevada 89505
(702) 328-3400

Attorneys for Respondent Washoe County

STATEMENT PURSUANT TO RULE 29.6

Respondent, Independent Sanitation Co., Inc. a Nevada Corporation, is wholly owned by its parent corporation, Caramella-Ballardini, Ltd., a Nevada Corporation, which is privately held. There are no subsidiaries of Respondent, Independent Sanitation Co., Inc.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
Reasons for Denying the Writ	4
Summary	4
I. The Ninth Circuit Correctly Applied The Decisions Of This Court In Finding That Petitioners Lacked Standing To Raise A Commerce Clause Challenge.	4
II. Petitioners' Arguments That The Mandatory Collection Ordinance And The Franchise Agreement With Independent Sanitation Violate The Commerce Clause Are Without Merit.	8
III. The Ninth Circuit Correctly Concluded That The Mandatory Recycling Fee Did Not Violate The Takings Clause.	11
IV. The Court Of Appeals Correctly Found That Washoe County's Mandatory Garbage Ordinance Was Within Its Police Powers Pursuant To Section 244.187 Of The Nevada Revised Statutes.	14
Conclusion	15

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517, 111 S. Ct. 913, 112 L. Ed. 2d 1125 (1991) 6

Ambulance Serv. of Reno, Inc. v. Nevada Ambulance Servs., Inc., 819 F.2d 910 (9th Cir. 1987) 10

Ben Oehrleins And Sons And Daughter, Inc, v. Hennepin County, 115 F.3d 1372 (1997) 7

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 97 S. Ct. 599, 50 L. Ed. 2d 514 (1977) 5

Browning-Ferris, Inc. v. City of Leon Valley, 590 S.W. 2d 729 (Tex. 1979) 10

C&A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383 (1994) 8, 9

California Reduction Co. v. Sanitary reduction Works, 199 U.S. 366, 26 S. Ct. 100, 50 L. Ed. 204 (1905) 10, 14

Chemical Waste Management v. Hunt, 504 U.S. 334, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992) 8

City of Glendale v. Trondsen, 308 P. 2d 1 (Calif. 1957) 12, 13

Contents

Page

City of Portsmouth v. McGraw, 488 N.E.2d 472 (Ohio 1986) 13

City of Spokane v. Carlson, 436 P.2d 454 (Wash. 1968) 10

Clarke v. Securities Industry Association, 479 U.S. 388, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987) 6

Dennis v. Higgins, 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991) 6

Fort Gratiot Landfill v. Mich. Dept. of Nat. Res., 504 U.S. 353, 112 S. Ct. 2019, 119 L. Ed. 2d 139 (1992) 8, 9

Gardner v. Michigan, 199 U.S. 325, 26 S. Ct. 106, 50 L. Ed. 212 (1905) 10

Individuals for Responsible Government v. Washoe County, 110 F.3d 699 (9th Cir. 1997) 4, 6, 8, 14

Kleenwell Biohazard Waste v. Nelson, 48 F.3d 391 (9th Cir. 1995) 9

Kootenai County Property Assn. v. Kootenai County, 769 P.2d 553 (Idaho 1989) 13

L & H Sanitation v. Lake City Sanitation, 769 F.2d 517 (8th Cir. 1985) 10

Contents

	Page
Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon, 511 U.S. 93, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994)	9
Peninsula Sanitation v. City of Manistique, 526 N.W. 2d 607 (Mich. 1995)	10
Pike v. Bruce Church, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)	9
Sligh v. Kirkwood, 237 U.S. 52, 35 S. Ct. 501, 59 L. Ed. 835 (1915)	14
United Food and Commercial Workers v. Brown Group, __ U.S. __, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996)	4, 5
U.S.A. Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2nd Cir. 1995)	9, 10
Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)	6
Zerr v. Tilton, 581 P.2d 364 (Kan. 1978)	13
Statutes Cited:	
Nev. Rev. Stat. § 0.025(1)(d)	12
Nev. Rev. Stat. § 244.187	10, 14, 15

Contents

	Page
Nev. Rev. Stat. § 244.187(3)	10, 15
Nev. Rev. Stat. § 244.188	10
Nev. Rev. Stat. § 444A.049(1)	12
Nev. Rev. Stat. §§ 444.510-444.530	14
United States Constitution Cited:	
Takings Clause	11, 13
Rule Cited:	
Supreme Court Rule 10	4
Other Authorities Cited:	
7 McQuillin, *Municipal Corporations* (3d ed.), § 24.251, p. 140	10
Washoe County Ordinance 838	2, 8
Washoe County Ordinance 848	2, 8
APPENDIX	
Appendix A — Relevant Statutes	1a

TO THE HONORABLE SUPREME COURT:

Washoe County, a political subdivision of the State of Nevada, and Independent Sanitation Co., Inc., Respondents, respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, filed herein by Petitioners, Individuals For Responsible Government, Inc., a non-profit Nevada Corporation, Janice Buse, Hilary Burson, and June Link.

STATEMENT OF THE CASE

The Petitioners' Statement of the Case is a rambling discussion that does not place the issues decided by the Ninth Circuit in proper context. Respondents adopt, with slight modification, as their Statement of the Case, the facts and "background" as recited in the Ninth Circuit opinion as follows:

Washoe County, Nevada, like many other environmentally concerned communities, confronts a problem stemming from the illegal dumping of trash at sites other than approved dump sites. In response to this problem, the Board of County Commissioners ("Commissioners"), in November 1991, enacted Ordinance 838 to amend chapter 90 of the County Code. Ordinance 838 provides that the County and its authorized agents or contractees "have the exclusive right to gather, collect and haul garbage" in certain unincorporated areas in Washoe County. It also provides that "[e]very owner of real property who accumulates or causes the accumulation or garbage . . . must subscribe to the [services for] collection, hauling and disposal of garbage" provided by the county through Independent Sanitation Co., its exclusive franchisee.[1]

---

1. By means of a contract dated April 14, 1992, the County granted (Cont'd)

In April, 1992, the Commissioners enacted Ordinance 848, which further amends chapter 90 of the County Code. Ordinance 848 creates an exemption from mandatory subscription to Independent Sanitation's garbage service for those owners and occupants of residential dwelling units who prefer to dispose of their own garbage. To qualify for such an exemption, these residents must haul their garbage "to an approved disposal site not less than every 7 calendar days. Independent Sanitation maintains the right to bill, on a quarterly basis, those who have been exempted. However, an exempt resident need not pay the bill provided that he submits to Independent Sanitation 'receipts or other proof showing that he has disposed of his garbage at an approve [sic] disposal site for each week within the previous quarter.' "

The enforcement of Ordinances 838 and 848 encountered difficulties. Prior to their passage, approximately 12,000 of Washoe County's 16,000 rural households subscribed to Independent Sanitation's garbage service, while approximately 4000 rural residents elected to dump their own trash. There are two legal dump sites in Washoe County, Nevada: the "Lockwood" landfill, located east of Reno, and the "Reno transfer station", located in the city of Reno. Independent Sanitation and its affiliate Reno Disposal Co. maintain and operate both dump sites.

[Petitioners make the contention that] despite these legal dumping options within Washoe County, prior to enactment of Ordinances 838 and 848 many county residents preferred to dispose of their household garbage in California because the

---

(Cont'd)
Independent Sanitation an exclusive franchise to "operate all garbage collection and disposal services in the unincorporated ares" of Washoe County. The April 1992 contract amended an earlier, similar contract that had been in force since 1983.

dump sites in Susanville and Portola, California were more convenient and cost effective than the options available in Washoe County. [There is, however, scant evidence in the record to demonstrate that Petitioners or any significant number of customers in Washoe County actually used landfills in California. Respondents contend that the driving distance from Reno to the California communities having landfills would make this practice cost prohibitive. Respondents further contend that Petitioners' factual allegation of the use of California landfills is made solely for the purpose of advancing a Commerce Clause argument.]

In response to Ordinance 848, approximately 400 residents received exemptions from mandatory collection, allowing them to dispose of their own garbage. However, some who initially obtained exemptions later had their exemptions revoked for failure to provide receipts documenting their weekly disposal of garbage. As of August, 1993, Reno Disposal Co. had filed suit in small claims court against 72 Washoe County residents who had failed to pay for their garbage service. Those subjected to suit included at least one person who refused to pay after his exemption was revoked.

Petitioner June Link, among others, was angry about being brought into court and ordered to pay for a service that she neither wanted nor believed she needed. Petitioners Hilary Burson and Janice Buse also object to being forced to pay for a service they do not want. Hence, in July 1994, Petitioners filed suit in state court, seeking a declaratory judgment that ordinances 838 and 848 are unconstitutional. Respondents removed the case to federal district court and filed motions for summary judgment.

The district court granted Respondents' motions for summary judgment in October, 1995. Petitioners timely

appealed. The Ninth Circuit Court of Appeals in *Individuals for Responsible Government v. Washoe County*, 110 F.3d 699 (9th Cir. 1997) affirmed the district court. Petitioners filed a Writ of Certiorari with this Court.

REASONS FOR DENYING THE WRIT

SUMMARY

Petitioners make no attempt to meet the considerations governing review on certiorari as set forth in Rule 10, Rules of the Supreme Court (May 1, 1997). Petitioners do not demonstrate that the decision of the Ninth Circuit is in conflict with a decision of another United States Court of Appeals on the same subject matter; or that the Ninth Circuit decided a federal question in a way that conflicts with applicable decisions of this Court; or that the case presents an important question of federal law which has not been, but should be, settled by this Court. To the contrary, this Writ of Certiorari is based on arguments that the Ninth Circuit was in error on factual matters, and misapplied settled principles of state and federal law. Accordingly, the Writ should be denied.

I.

THE NINTH CIRCUIT CORRECTLY APPLIED THE DECISIONS OF THIS COURT IN FINDING THAT PETITIONERS LACKED STANDING TO RAISE A COMMERCE CLAUSE CHALLENGE.

The Ninth Circuit Court of Appeals held that petitioner, Individuals for Responsible Government, Inc., and the individual petitioners lacked standing to pursue their claims. Petitioners do not challenge this holding as to the individuals, but claim the holding was error as to the association. Petitioners cite *United*

Food and Commercial Workers v. Brown Group, __ U.S. __, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996), as support for their position. While paying lip service to the standing requirements for associations as outlined by the Court in that decision, petitioners ignore the fact that Individuals for Responsible Government, Inc. cannot meet them.

An association has standing to bring suit on behalf of its members in the following circumstances: (1) when the members themselves would have standing to sue in their own right; (2) the interests the association seeks to protect in the suit are germane to its purpose; and (3) the claims asserted and the relief requested do not require that the individual members participate in the lawsuit. *United Food and Commercial Workers v. Brown Group*, 116 S. Ct. at 1534; *see also Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3, 97 S. Ct. 599, 602 n.3, 50 L. Ed. 2d 514 (1977). The record in this action is devoid of any evidence establishing that the members of Individuals for Responsible Government, Inc. have standing to sue in their own right or that the association's purpose is in any way related to the Commerce Clause claim they have raised.

Petitioners' only assertion regarding the members of Individuals for Responsible Government, Inc. is that they are persons who have attempted to assist Washoe County in the enforcement of anti-dumping ordinances. *Petition for Writ of Certiorari* at 9. From the remainder of petitioners' pleadings, it is clear that the claims of the association members would be no different than those asserted by the individual petitioners; that they are paying for garbage services they do not want. On this basis, the Ninth Circuit Court of Appeals found that the individual petitioners, while satisfying the constitutional requirements for standing, failed to satisfy the general prudential considerations for standing necessary to assert a Commerce Clause claim because their interests were "not even marginally

related to the purposes underlying the dormant Commerce Clause". 110 F.3d at 702-704. Petitioners do not challenge this finding.

One of the prudential requirements of standing is that a plaintiff's complaint must fall within the zone of interests which is protected or regulated by the statutory provision or constitutional guarantee in question. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475, 102 S. Ct. 752, 760, 70 L. Ed. 2d 700 (1982); *see also Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 523-24, 111 S. Ct. 913, 918, 112 L. Ed. 2d 1125 (1991). The zone of interests test is more narrowly construed when a plaintiff's claim is brought pursuant to a constitutional guarantee than when it is brought under statute. *Clarke v. Securities Industry Association*, 479 U.S. 388, 400 n.16, 107 S. Ct. 750, 757 n.16, 93 L. Ed. 2d 757 (1987).

Like the individual petitioners' claims, the interests of the association members are only peripherally related to the purposes of the dormant Commerce Clause in limiting the power of the states to erect barriers to interstate trade. *See Dennis v. Higgins*, 498 U.S. 439, 446, 111 S. Ct. 865, 870, 112 L. Ed. 2d 969 (1991). Nothing in Washoe County's mandatory garbage collection ordinance requires that Independent Sanitation Co., Inc. dump the garbage it collects in Nevada, and petitioners' injury — having to pay for garbage service they do not want — would be the same if Washoe County's garbage were dumped in California or some other state instead. The ordinance does not impose barriers on interstate commerce which can be reached by petitioners' claims and those claims do not fall within the zone of interests to be protected by the dormant Commerce Clause. Thus, as its members lack standing to sue in their own right, Individuals for Responsible Government, Inc. cannot satisfy the first requirement of standing as an association.

The Eighth Circuit cited with approval and adopted the foregoing analysis of the Ninth Circuit on the zone of interests test in *Ben Oehrleins And Sons And Daughter, Inc, v. Hennepin County*, 115 F.3d 1372 (1997). The case was brought by haulers of solid waste who were required to use the designated facility under a flow control county ordinance. The Eighth Circuit held that although the haulers of the solid waste had standing to challenge the flow control measure because of the payment of higher fees, the hauler's customers and the general consumers did not have standing since their harm consisted only of higher garbage bills and this "harm alleged by the generator plaintiffs is narrow, personal, and strictly local." 115 F.3d at 1382. Accordingly, the Ninth Circuit's application and interpretation of the Commerce Clause is correct, and there is no conflict amoung the circuit courts to justify review by writ of certiorari.

Nor can Individuals for Responsible Government, Inc. satisfy the second prong of the analysis. The interests in interstate commerce which petitioners seek to protect by this lawsuit can hardly be described as germane to the association's purported purpose of controlling illegal dumping within Washoe County. From a review of the record of the proceedings below, it is clear that there is absolutely no nexus between the two. There is no evidence that illegal dumping in Washoe County is caused by interstate commerce or that interstate commerce is affected by the activities of Individuals for Responsible Government, Inc. in attempting to curb illegal dumping. They are entirely unrelated.

The Ninth Circuit Court of Appeals did not err in its determination that Individuals for Responsible Government, Inc. lacked standing to maintain this action. Its members lack standing to sue in their own right and the association's purpose is irrelevant to the Commerce Clause interests it seeks to protect. Accordingly, the Writ should be denied.

II.

PETITIONERS' ARGUMENTS THAT THE MANDATORY COLLECTION ORDINANCE AND THE FRANCHISE AGREEMENT WITH INDEPENDENT SANITATION VIOLATE THE COMMERCE CLAUSE ARE WITHOUT MERIT.

The Ninth Circuit did not reach the merits of Petitioners' Commerce Clause claim that Washoe County Ordinances 838 and 848 interferes with interstate commerce by preventing Petitioners from using landfills outside the State of Nevada. The Ninth Circuit held that Petitioners' lacked standing to make a Commerce Clause challenge, but in so doing observed that "we have serious reservations about the strength of this argument." 110 F.3d at 702.

Petitioner's make the same Commerce Clause arguments in their *Petition for Writ of Certiorari*. Petitioners tie together the mandatory collection ordinance with the exclusive franchise granted to Independent Sanitation. Petitioners then attempt to raise a Commerce Clause issue by reliance upon this Court's decision in *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994). This attempt fails.

In recent years, this Court has had occasion to address the subject of movement of solid waste in interstate commerce and the extent of local regulation that will be permitted under the Commerce Clause. Each case involved some aspect of impeding the free flow of solid waste across state lines. The state either attempted to place unreasonable restrictions on imports of solid waste from other states, *Chemical Waste Management v. Hunt*, 504 U.S. 334, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992) (additional fee imposed on out-of-state waste); *Fort Gratiot Landfill v. Mich. Dept. of Nat. Res.*, 504 U.S. 353, 112 S. Ct.

2019, 119 L. Ed. 2d 139 (1992) (state statute permitting county to ban out-of-state solid waste held violated the Commerce Clause); *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 511 U.S. 93, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994) (state statute imposed surcharge on out-of-state waste and disposed of within the state), or attempted to prevent the export of solid waste to competitive facilities across state lines. *Carbone*, ("flow control" ordinance directed solid waste to municipal transfer station when out-of-state competing facilities existed).

The Washoe County codes in question do not attempt to either direct the flow of solid waste or restrict its free movement. We are here dealing with garden variety solid waste ordinances enacted pursuant to the police power of a local community. No decision can be found that the typical solid waste collection practices of a community are a restraint on interstate commerce. If so, virtually the entire system of solid waste collection and disposal throughout the United States would be held unconstitutional. *See Kleenwell Biohazard Waste v. Nelson*, 48 F.3d 391, 395 (9th Cir. 1995) (*Citing Pike v. Bruce Church*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970) Ninth Circuit upholds a state licensing requirement for the transport of medical waste notwithstanding that such waste is transported across state lines).

The foregoing decisions of this Court cannot be read as a limitation on the traditional role of local government in dealing with solid waste under its police powers. The same Commerce Clause argument made by Petitioners was made in *U.S.A. Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2nd Cir. 1995). In *Town of Babylon*, the ordinance under attack provided that the local community would take over all solid waste collection and entered into an exclusive franchise with a private contractor for that service. The challenge was made that *Carbone* invalidate

such an arrangement. The Second Circuit did not read the decisions of this Court as changing the traditional role of local government in dealing with solid waste issues under its police powers as firmly established by this Court in *California Reduction Co. v. Sanitary reduction Works*, 199 U.S. 366, 26 S. Ct. 100, 50 L. Ed. 204 (1905) and *Gardner v. Michigan*, 199 U.S. 325, 26 S. Ct. 106, 50 L. Ed. 212 (1905). 66 F.3d at 1292-1293.

Similar to the ordinances in *Town of Babylon*, the State of Nevada, has granted counties the authority to "displace or limit competition" in the area of the "collection and disposal of garbage and other waste." NRS 244.187(3). This grant of authority includes awarding an "exclusive franchise" to provide such services. NRS §§ 244.187 and 244.188. *See Ambulance Serv. of Reno, Inc. v. Nevada Ambulance Servs., Inc.*, 819 F.2d 910 (9th Cir. 1987) (upheld the right of Washoe County to enter into an exclusive franchise for ambulance service under NRS 244.187).

Furthermore, it is settled state law that in the exercise of its police power, local governments usually reserve to itself the service of providing collection and disposal of solid waste and the usual practice is to exclude all others from providing those services. This is accomplished by entering into an exclusive franchise arrangement. *See generally* 7 McQuillin, *Municipal Corporations* (3d ed.), § 24.251, p. 140. The state courts have been unanimous in upholding exclusive franchise arrangements for the collection and disposal of solid waste under the police power of the state. *See, e.g., Peninsula Sanitation v. City of Manistique*, 526 N.W. 2d 607 (Mich. 1995); *City of Spokane v. Carlson*, 436 P.2d 454 (Wash. 1968); *Browning-Ferris, Inc. v. City of Leon Valley*, 590 S.W. 2d 729 (Tex. 1979); representative of the federal authorities to the same effect see *L & H Sanitation v. Lake City Sanitation*, 769 F.2d 517 (8th Cir. 1985).

Petitioners also make a Commerce Clause argument based upon Washoe County's mandatory solid waste collection ordinance. Again, local ordinances requiring the mandatory collection of garbage and solid waste is based upon settled state law and does not deserve review by this Court. The unanimous cases upholding similar mandatory solid waste collection ordinances are discussed in Part III of this *Brief in Opposition* and are fully applicable there.

Accordingly, this Court can properly conclude that Petitioners' Commerce Clause arguments based on Washoe County's mandatory collection ordinance and its grant of an exclusive franchise are without merit. Accordingly, these arguments advance no justification to grant the Writ.

III.

THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT THE MANDATORY RECYCLING FEE DID NOT VIOLATE THE TAKINGS CLAUSE.

Respondent, Independent Sanitation, under its exclusive franchise agreement with Washoe County, provides a curbside recycling service for all residential customers. Independent Sanitation bills its customers $1.25 per month for the recycling service, even if they never use the service. Petitioners argue they have a property right in the recyclable materials and that the curbside recycling program constitutes a taking of private property for public use without just compensation, in violation of the Takings Clause of the U.S. Constitution.

The Ninth Circuit found this argument to be without merit. The Ninth Circuit first observed that the curbside service cannot be considered as a "taking" because residents have no obligation to utilize that service. Residents can legally choose to deliver

their recyclable materials to recycling centers, or not to recycle at all. Further, the Ninth Circuit correctly held that the $1.25 per month service charge is not a taking because it is equivalent to a general property tax targeted to fund a specific county-wide service. This is the same as a school tax that property owners are required to pay, even though their children do not attend public schools.

Completely overlooked by Petitioners is the fact that a curbside recycling program is not a discretionary matter for either Washoe County or Independent Sanitation. Providing curbside recycling is a requirement of Nevada state law. The Nevada Legislature has determined that it shall be the policy of the state that large counties "*shall* make available" a program for "separation at the source of recyclable material from other solid waste originating from the residential premises". NRS 444A.049(1). The word "shall" makes this a mandatory requirement. *See* NRS 0.025(1)(d) ("'Shall' imposes a duty to act") Washoe County has merely complied with state law by requiring Independent Sanitation to provide the curbside recycling service. Petitioners made no challenge in the District Court, nor on appeal to the Ninth Circuit, that the Nevada statute, NRS 444A.049(1), was unconstitutional.

The decision of the Ninth Circuit upholding the fee charged by Independent Sanitation for the curbside recycling program rests on settled state law. The authorities upholding a fee for mandatory garbage collection are fully applicable to the recycling fee charged by Independent Sanitation in providing the recycling service. Representative of this line of cases is the California Supreme Court decision in *City of Glendale v. Trondsen*, 308 P.2d 1 (Calif. 1957). In *City of Glendale*, the argument was made that the charge for garbage collection service could not be collected because the service was never used. The Court answered this argument by noting that mandatory garbage

collection was analogous to the requirement that all residents connect with the city sewer system. This practice has been universally upheld by the courts against any challenge that existing sewer facilities on the premises were adequate. The same analysis applies to other public utilities such as connecting to the City's water system. 308 P.2d at 5.

The applicable rule of *City of Glendale* is that mandatory solid waste collection is a *service* which applies to all residents uniformly. It is not a valid objection under the police power that the service is not used or not wanted. *See City of Portsmouth v. McGraw*, 488 N.E.2d 472, 474 (Ohio 1986) (garbage collection fee levied on every family with "living quarters" or in which "garbage or refuse is created". The complaining party admitted having living quarters, but argued that she never used the service, relying on friends and neighbors to dispose of solid waste accumulations); *Zerr v. Tilton*, 581 P.2d 364, 371 (Kan. 1978) ("The fact that plaintiffs voluntarily chose not to avail themselves of the service is not susceptible of the construction that they are not *receiving* the service" (emphasis added); *Kootenai County Property Assn. v. Kootenai County*, 769 P.2d 553, 555 (Idaho 1989) (mandatory service upheld).

Accordingly, in concluding that the curbside recycling program and service fee were not "takings" under the Taking Clause, the Ninth Circuit was consistent with well-settled state and federal law and no issue is presented for review by way of a writ of certiorari.

IV.

THE COURT OF APPEALS CORRECTLY FOUND THAT WASHOE COUNTY'S MANDATORY GARBAGE ORDINANCE WAS WITHIN ITS POLICE POWERS PURSUANT TO SECTION 244.187 OF THE NEVADA REVISED STATUTES.

Petitioners argue that the Ninth Circuit Court of Appeals overlooked facts showing that Washoe County's enactment of its mandatory garbage ordinance was in excess of the powers statutorily granted it by section 244.187 of the Nevada Revised Statutes. This argument is disingenuous, as petitioners have confused Washoe County's authority to mandate garbage collection with its authority to grant a franchise to a garbage collector.

It is beyond dispute that the government's enactment of laws pertaining to garbage and rubbish control is a proper exercise of the police power. *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 316-17, 26 S. Ct. 100, 102, 50 L. Ed. 204 (1905). It is pursuant to this inherent police power and the statutory authority granted municipalities by Nevada's solid waste statutes that Washoe County has mandated the collection of garbage from residents. *See* Nev. Rev. Stat. §§ 444.510-444.530 (Appendix A, pp. 2a-3a). Thus, it is pursuant to these authorities that the validity of Washoe County's ordinance must be tested. As petitioners concede, the Ninth Circuit Court of Appeals correctly held that Washoe County's mandatory garbage ordinance should be upheld if it was within the scope of the authority granted the county by the state, aimed at serving a legitimate public purpose and was rationally related to that purpose. 110 F.3d at 704. *See also Sligh v. Kirkwood*, 237 U.S. 52, 61, 35 S. Ct. 501, 503, 59 L. Ed. 835 (1915).

It is at this point that petitioners' confusion takes over, however, and they go on to argue that the enactment of the ordinance does not meet the standards set forth in the statute which allows counties to grant garbage collection franchises. A board of county commissioners in Nevada is authorized to displace or limit competition for the collection and disposal of garbage in order to provide adequate, economical and efficient services to county inhabitants and to promote the welfare of those inhabitants. Nev. Rev. Stat. § 244.187(3). The statute has no application to Washoe County's authority to mandate garbage collection, but only speaks to one of the ways the county may choose to have that collection accomplished.

Even if petitioners' claims regarding section 244.187 of the Nevada Revised Statutes could be said to have some applicability to the enactment of the mandatory garbage ordinance, their arguments would be unavailing nonetheless. It is clear from the absence of citation to the record of this action that petitioners did not produce any evidence below which would show that mandatory garbage collection in Washoe County is not adequate, economical and efficient or that it does not promote the welfare of the county's inhabitants. Petitioners' claim of error in regard to Washoe County's exercise of its police power is without substance or support, in fact or in law. Therefore, the Petitioners present no basis for review by way of a writ of certiorari.

CONCLUSION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari for the reason that this case presents no issue appropriate for the Court's review insofar as (1) the Ninth Circuit decision is based on settled law as set forth in the opinions of this Court; and (2) no important question of federal law is raised, nor conflict among the circuits which requires adjudication or clarification.

Respectfully submitted,

RICHARD A. GAMMICK
Washoe County District Attorney
GREGORY R. SHANNON
Counsel of Record
MELANIE FOSTER
Deputy District Attorney
P.O. Box 11130
Reno, Nevada 89505
(702) 328-3400

Attorneys for Respondent
Washoe County

FRANK CASSAS
MARSHALL HILL CASSAS
& de LIPKAU
Suite 300
333 Holcomb Avenue
P.O. Box 2790
Reno, Nevada 89505
(702) 323-1601

Attorneys for Respondent
Independent Sanitation Co., Inc.

APPENDIX A — RELEVANT STATUTES

NEVADA REVISED STATUTES

244.187 Displacement or limitation of competition: Services. A Board of county commissioners may, to provide adequate, economical and efficient services to the inhabitants of the county and to promote the general welfare of those inhabitants, displace or limit competition in any of the following areas:

1. Ambulance service.

2. Taxicabs and other public transportation, unless regulated in that county by an agency of the state.

3. Collection and disposal of garbage and other waste.

4. Operations at an airport, including but not limited to the leasing of motor vehicles and the licensing of concession stands, but excluding police protection and fire protection.

5. Water and sewage treatment, unless regulated in that county by an agency of the state.

6. Concessions on, over or under property owned or leased by the county.

7. Operation of landfills.

8. Construction and maintenance of benches and shelters for passengers of public mass transportation.

Appendix A

444.510 Municipal solid waste management systems: Development, revision and approval of plans; cooperative agreements.

1. The governing body of every municipality or district board of health created pursuant to NRS 439.370 shall develop a plan to provide for a solid waste management system which adequately provides for the management and disposal of solid waste within the boundaries of the municipality or within the area to be served by the system, whether generated within or outside of the boundaries of the area.

2. The plan may include ordinances adopted pursuant to NRS 444.520 and 444.530.

3. Such a governing body may enter into agreements with governing bodies of other municipalities, or with any person, or with a combination thereof, to carry out or develop portions of the plan provided for in subsection 1, or both, and to provide a solid waste management system, or any part thereof.

4. Any plan developed by the governing body of a municipality or district board of health created pursuant to NRS 439.370 must be submitted to the state department of conservation and natural resources for approval according to a schedule established by the state environmental commission. No action may be taken by that governing body or district board of health until the plan has been approved. The department shall determine the adequacy of the plan within 90 days after receiving the plan. If the department does not respond to the plan within 90 days, the plan shall be deemed approved and becomes effective immediately.

Appendix A

5. An approved plan remains in effect until the plan is revised and the revised plan is approved. A plan must not conflict with the statewide plan adopted by the state environmental commission pursuant to NRS 444.570. Plans must be revised to reflect proposed changes in the solid waste management system, and changes in applicable regulations.

444.520 Municipal solid waste management systems: Additional fees and charges.

1. The governing body of any municipality which has an approved plan for the management of solid waste may, by ordinance, provide for the levy and collection of other or additional fees and charges and require such licenses as may be appropriate and necessary to meet the requirements of NRS 444.460 to 444.610, inclusive.

2. The fees authorized by this section are not subject to the limit on the maximum allowable revenue from fees established pursuant to NRS 354.5989.

444.530 Municipal solid waste management systems: Regulations for operation. The governing body of a municipality having a solid waste management system within its boundaries shall, by ordinance, establish regulations for the operation of such system. No such ordinance shall be in conflict with any regulation adopted by the state environmental commission.